Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

LIQUIDATION COMMISSION FOR BCCI (OVERSEAS) LIMITED, MACAU,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a bank liquidator authorized by a sovereign foreign government is entitled to an evidentiary hearing to determine whether it can be equated with a criminal defendant for purposes of RICO's forfeiture provision?

2. Whether a separately chartered, capitalized and managed foreign bank, whose liability is limited under Macanese law, should be equated, under U.S. law, with criminal defendants who agreed to be bound by Macanese law?

3. Whether applying principles of international comity to follow the law of Macau in determining whether a bank liquidator may be equated with a criminal defendant for purposes of RICO's forfeiture provision undermines a federal statute?

LIST OF PARTIES

The parties to the proceeding are:

Petitioner:
LIQUIDATION COMMISSION for BCCI (OVERSEAS) LIMITED, MACAU.

Respondent:
UNITED STATES OF AMERICA.

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OPINIONS BELOW

The decision of the United States District Court for the District of Columbia (hereinafter, "District Court") granting Respondent's motion to dismiss a petition filed by Petitioner seeking adjudication of its interests in financial accounts forfeited pursuant to 18 U.S.C. § 1963 (l)*(2)* is reported at *U.S.v. BCCI Holdings (Luxembourg) S.A.*, 833 F. Supp. 32 (D.D.C. 1993). (App. E,1e-19e). The decision of the United States Court of Appeals for the District of Columbia Circuit (hereinafter, "Appellate Court") affirming the decision of the District Court is reported at *U.S. v. BCCI Holdings (Luxembourg), S.A.*, 48 F.3d 551 (D.C. Cir. 1995). (App. D, 1d-10d).

STATEMENT OF JURISDICTION

Petitioner brought this case in the District Court, pursuant to 18 U.S.C. § 1963 (l)(2). An order in Respondent's favor dismissing Petitioner's petition was entered by the District Court on August 19, 1993. (App E, 1e-19e). On October 29, 1993 the District Court entered final judgment against Petitioner and dismissed its petition. (App. F, 1f-6f). Petitioner filed a timely notice of appeal to the Appellate Court on October 29, 1995. Title 28 U.S.C. § 1291 provided federal appellate jurisdiction over the final judgment of the District Court. On March 3, 1995 the Appellate Court entered a judgment affirming the judgment of the District Court. (App. C, 1c-2c). Petitioner's motion for rehearing filed April 17, 1995 and Petitioner's suggestion for rehearing *In banc* also

filed April 17, 1995 were both denied on June 2, 1995. (respectively, App. B, 1b-2b, and App. A, 1a-2a). This Petition for Writ of Certiorari is timely filed within 90 days of June 2, 1995 by August 31, 1995.

STATUTES INVOLVED

The Racketeer Influenced and Corrupt Organization Act (hereinafter, "RICO") 18 U.S.C. § 1963(*l*)(2) provides:

(*l*)(l) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts

supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portion of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that-

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was

at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

STATEMENT OF THE CASE

A. Procedural History

Petitioner is the Liquidation Commission appointed by the Macanese Government to liquidate BCCI (Overseas) Limited, Macau. Pursuant to 18 U.S.C. § 1963 (*l*)(2), Petitioner filed a petition in the District Court asking the court to adjudicate Petitioner's interest in certain assets forfeited under RICO by four BCCI criminal defendants, BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International S.A., Bank of Credit and Commerce International, (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited. (hereinafter, "BCCI Criminal Defendants). On August 19, 1993 the District Court dismissed the petition filed by Petitioner, the Liquidation Commission for BCCI (Overseas) Limited, Macau pursuant to 18 U.S.C. § 1963(*l*). The Appellate Court affirmed the dismissal of the petition on appeal. This Petition For Writ of Certiorari raises for review the Appellate Court's affirmance

of the dismissal of this petition.

B. Statement of Facts

In 1972, the four BCCI Criminal Defendants were chartered in the Cayman Islands and Luxembourg. In addition to the BCCI Criminal Defendants, international banking transactions were also conducted in 28 countries throughout the world by other foreign banking institutions under the "BCCI" name. Included among these banking institutions was BCCI (Overseas) Limited, Macau.

While BCCI (Overseas) Limited, Macau used the BCCI name in Macau, it was a juridical entity separate and distinct from the BCCI Criminal Defendants. It was created, capitalized and managed independently of the of the four BCCI Criminal Defendants. BCCI (Overseas) Limited, Macau, was required under Macanese law to be separately capitalized, separately managed, and separately licensed by the Macau Government. Petitioner was subject to Macanese laws and regulations which specifically prohibited, inter alia, assets booked with BCCI (Overseas) Limited, Macau from being used to meet obligations incurred abroad by BCCI banks including the BCCI Criminal Defendants.

In 1991, bank regulators in the Cayman Islands and Luxembourg jointly instituted a worldwide shutdown of the BCCI Criminal Defendants. Liquidators were appointed by courts in the Cayman Islands and Luxembourg to collect assets belonging to the BCCI Criminal Defendants and to distribute those assets to creditors and depositors worldwide. As a result of this situation, BCCI (Overseas) Limited, Macau was put under the control of the Government of Macau on

July 8, 1991. On April 8, 1992, the Government of Macau established Petitioner as a liquidation commission to protect the interests of the bank's depositors and creditors.

On December 9, 1991, the District Court handed down a criminal indictment charging the BCCI Criminal Defendants with, inter alia, violations of RICO. The indictment did not contain any reference whatsoever to BCCI (Overseas) Limited, Macau or to its liquidator, Petitioner. On January 24, 1992, the District Court accepted a guilty plea to the RICO charges made by the BCCI Criminal Defendants. BCCI (Overseas) Limited, Macau was not named as a defendant in the indictment, nor was Petitioner, its liquidator. Therefore neither was a party to the plea bargain agreement.

Under the plea bargain, the BCCI Criminal Defendants agreed to forfeit to the Government, pursuant to 18 U.S.C. § 1963, virtually all of their property located in the United States. Among the assets seized by the Government pursuant to this plea agreement were funds held in New York bank accounts under the name of BCCI (Overseas) Limited, Macau in excess of $1.6 million.

On April 12, 1992, Petitioner filed an action in the District Court to recover the forfeited assets pursuant to 18 U.S.C. § 1963(*l*). This petition included allegations that:

(1) under Macanese law, BCCI (Overseas) Limited, Macau was a separate juridical entity which had not been convicted of a RICO violation;

(2) under United States law, BCCI (Overseas) Limited, Macau was likewise a separate juridical entity that

had not been convicted of a RICO violation;

(3) BCCI (Overseas) Limited, Macau maintained separate books and records from the BCCI Criminal Defendants;

(4) BCCI (Overseas) Limited, Macau was not managed by the BCCI Criminal Defendants;

(5) there had been no showing that the BCCI (Overseas) Limited, Macau funds forfeited were the proceeds of racketeering activity.

On May 1, 1992, the Government moved to dismiss the petitions under Rule 12(b)(6) on the basis that Petitioner lacked standing to assert claims under 18 U.S.C. § 1963(*l*). The Government claimed that there was an identity of interest between the BCCI Criminal Defendants and Petitioner, that the BCCI Criminal Defendants held actual title to the property at issue, and that the local interests of Petitioner and Macau in having the issues decided pursuant to Macanese law were subordinate to the interests of the United States.

In opposing the Government' s motion to dismiss, the Petitioner argued that it was not a "defendant" within the meaning of RICO, because BCCI (Overseas) Limited, Macau, for which it is a liquidator, was a juridical entity, capitalized, and managed independently of the BCCI Criminal Defendants. Further, Petitioner argued that the law of Macau should be applied to the dispute, and that under this law, BCCI (Overseas) Limited, Macau was considered to be a separate juridical entity. In addition, Petitioner argued that under federal and state common law, the question of whether a

foreign bank is a separate entity is a complex question of fact which can only be resolved after a full evidentiary hearing. Finally, Petitioner contended that it would be inequitable to charge it with the criminal deeds of the BCCI Criminal Defendants by upholding the forfeiture if its assets were not derived from racketeering activities.

In reply, the Government proffered the affidavits of a single foreign lawyer with respect to the issue of the law in Macau.

At first, recognizing that there were substantial issues of fact and law to be decided in determining whether Petitioner, the Liquidation Commission for BCCI (Overseas) Limited, Macau, should be treated as a "defendant" under 18 U.S.C. § 1963(*l*), the District Court initially scheduled an evidentiary hearing in June, 1993. The Order setting the hearing specified that Petitioner would be given 45 to 60 minutes to present testimony in support of its case: both legal arguments and relevant factual evidence, including testimony and/or documentation relating to the nature of the relationship between the petitioner and Bank of Credit and Commerce International (Overseas) Limited.

(emphasis added).

Five days after this order was entered, the Government filed a motion *in limine* to exclude presentation of factual evidence and testimony on foreign law at the hearing on the grounds that such evidence was irrelevant to the court's resolution of its Motion to Dismiss. Despite opposition to the motion *in limine* by order dated May 27, 1993, the District Court granted the Government's motion *in limine*, precluding from the hearing the introduction of any factual evidence

regarding the relationship between Petitioner and the BCCI Criminal Defendants and any testimony regarding the content of foreign law because such testimony "may be more involved than the Court initially assumed." (emphasis added) The court also reduced the time petitioners would have to argue from 45-60 minutes to 20 minutes.

Oral argument on the Government's Motion to Dismiss was held on June 21, 22 and 23, 1993, more than one year after Petitioner filed its petition[1]. At the abbreviated, non-evidentiary hearing counsel for Petitioner was prohibited from putting into evidence any documents or testimony concerning foreign law. Nor were counsel permitted to elicit testimony from their client concerning the relationship between BCCI (Overseas) Limited, Macau and the BCCI criminal defendants.

By order dated August 19, 1993, the District Court granted the Government's motion to dismiss the petition by equating the Petitioner with BCCI (Overseas) Limited, Macau for which they served as liquidator and by applying federal common law -- and not Macanese law --to determine whether the foreign banks were juridical entities separate from the BCCI criminal defendants. (App. E, 1e-19e.). Final judgment on the order granting the Government's motion to dismiss was

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1. Pursuant to the RICO Statute, full evidentiary hearings on "L" claims are to be held, "to the extent practicable and consistent with the interests of justice,...within 30 days of the filing of the petition." 18 U.S.C. § 1963(*l*)(4). Due to the District Court's belated scheduling of a hearing, Petitioner was deprived of the opportunity to present its case for over a year. Moreover, when the hearing was finally held, it was less that the full evidentiary hearing called for by § 1963(*l*)(5).

entered on October 29, 1993. (App. F, 1f-6f).

On October 29, 1993, Petitioner filed a timely notice of appeal to the Appellate Court. On March 3, 1995 the Appellate Court affirmed the decision of the District Court holding that BCCI (Overseas) Limited, Macau did not have a separate legal identity apart from BCCI Criminal Defendants and therefore was not a party "other than the defendant" authorized to file petitions under Section 1963(*l*)(2). (App. D, 2d-4d). The Appellate Court also rejected Petitioner's arguments that, as a Macanese Government appointed bank liquidator, Petitioner was a separate entity from the bank it was liquidating, and that the law of Macau should be applied to determine whether BCCI (Overseas) Limited, Macau operated independently from the BCCI Criminal Defendants. (App. D, 5d-10d).

Petitioner filed this timely Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

THIS MATTER PRESENTS IMPORTANT ISSUES OF FEDERAL LAW WHICH HAVE NOT BEEN DECIDED BY THIS COURT AND ALSO PRESENTS A SPLIT OF AUTHORITY BETWEEN THE HIGHEST COURT OF A STATE AND THE FEDERAL CIRCUITS. ACCORDINGLY, THIS COURT, RESPECTFULLY, SHOULD EXERCISE ITS DISCRETIONARY POWER AND REVIEW THE DECISION BELOW.

This matter raises important, undecided questions of federal law concerning the due process rights afforded to a

liquidation commission established by a foreign government to marshall and distribute the assets of a former bank, as well as important issues of international comity. Moreover, as this Court has not yet addressed the issue of who is a "defendant" for purposes of the forfeiture provisions of RICO in this context, this matter also raises an issue of first impression. Additionally this matter lays bare a split of authority existing between the highest court of the State of New York and the Federal Circuits.

Specifically, this matter raises the issue of what rights, if any, are to be afforded to a liquidation commission established by the Government of Macau to marshall and distribute the assets of the former Macanese bank pursuant to a plea bargain between the Criminal Defendants and the U.S. Government.

Based on an alleged identity of interests between the Macanese Government's liquidation commission and the BCCI Criminal Defendants, the U.S. Government seized more than $1.6 million dollars belonging to the Macanese bank that had been held in various accounts in the United States pursuant to the forfeiture provisions of RICO. When the liquidation commission, in the course of marshalling the assets of the former bank to distribute them to creditors, petitioned to have these assets released pursuant to 18 U.S.C. § 1963(*l*)(2), the District Court, without allowing the evidentiary hearing required by law, dismissed the petition for an alleged lack of standing after equating the Macau Government's liquidation commission with the BCCI Criminal Defendants. On March 3, 1995 the Appellate Court upheld the dismissal based on three (3) apparent misconceptions: (1) the identity of the petitioning party; (2) the applicability of *Sokoloff v. National*

Bank of New York, 224 N.Y.S. 1202, 112 (Sup.Ct. 1927), *aff'd without opinion* 227 N.Y.S. 907 (N.Y. App. Div. 1928), *aff'd*, 164 N.E. 745 (N.Y. 1928), and subsequent cases, to the Case at bar, despite clear federal circuit precedent to the contrary; and (3) concerns about the uniform enforcement of state criminal laws. In doing so, the due process rights of the Macanese liquidation commission were completely ignored, and the Macanese creditors it represents as well as the liquidators of several other similarly situated banks that unknowingly became entangled in an international banking scandal.

Petitioner respectfully submits that the decision below also harms Macanese sovereignty as it thwarts Macau's efforts to protect creditors within its own territory. Thus, this matter raises important issues about international comity. It also sets a dangerous precedent for U.S. banks operating abroad, for if the reasoning of the appellate court were adopted by foreign tribunals, American banks, and their depositers would not only be denied "due process" rights, they would also risk being adjudged libel for the acts of foriegn affiliated banks.

In order to protect the due process rights of the Macanese liquidation commission and the Mecanese creditors, and in the interest of international comity as well as the foreign relations of the United States, and to avoid dangerous precedent which may adeversely affect the international banking system, this Court, respectfully, must exercise its discretionary power to review these important issues.

A. This Court, Respectfully, Should Decide The Important Issue Of Federal Law Of Whether Petitioner, The Macanese Liquidation Commission, Which Was

Appointed By the Macanese Government Should Be Equated, Under U.S. Law, With The Criminal Defendants Who Agreed To Be Bound By Macanese Law.

Both the District Court and the Appellate Court equated Petitioner, Macanese Liquidation Commission, with the BCCI Criminal defendants. Specifically, the Appellate Court found that Petitioner stands in the shoes of the bank it represents and enjoys the same rights and interests. (App. D, 7d). However, this finding only addresses half of the equation. While the Petitioner may have the same rights and interests as the former Macanese bank, it also owes a duty to depositors and creditors of the bank to marshall and distribute the former bank's assets. This duty which arises from Petitioner's appointment as a representative of the Macau government, distinguishes it from the former Macanese bank. Petitioner is, in fact, two steps removed from the BCCI Criminal Defendants, and simply cannot be equated with a "defendant" for purposes of 18 U.S.C. § 1963(*l*)(2). At a minimum it is entitled to due process, through a proscribed evidentiary hearing to demonstrate its legal interest in the funds at issue. *See U.S. v. Kramer*, 912 F.2d 1257, 1258 & n.1 (11th Cir. 1990).

Thus, without affording it a full due process hearing--as required--it was error to equate the Macanese Liquidation Commission with the Macanese bank itself as, although it may possess the same rights and interests as the bank, the duty it owes to depositors and creditors clearly distinguishes it from the former bank itself. At a minimum, Petitioner is, respectfully, entitled to an evidentiary hearing to demonstrate its legal interest in the funds at issue. *See Kramer*, 912 F.2d at 1258 & n.1.

B. This Court, Respectfully, Should Decide The Important Issue Of Federal Law Of Whether A Separately Chartered, Capitalized And Managed Foreign Bank, Whose Liability Is Limited Under Macanese Law, Should Be Equated, Under U.S. Law, With The Criminal Defendants.

Even assuming that it was not error to equate the Macau Liquidation Commission with the former Macanese bank, Petitioner respectfully submits that This Court should decide the important issue of federal law of whether a separately chartered, capitalized and managed foreign bank, whose liability is limited under Macanese law, should be equated with the BCCI Criminal Defendants.

Under the federal common law established in *Sokoloff v. National City Bank of New York*, 130 Misc. 66, 73 224 N.Y.S. 102, 114 (Sup. Ct. 1927), *aff'd. mem.*, 223 App. Div. 754, 227 N.Y.C. 907, *aff'd.*, 250 N.Y. 69, 164 N.E. 745 (1928) and the line of cases that followed, where a depositor makes a deposit in a foreign branch of a U.S. bank and the branch is subsequently closed or in default, the parent bank can, nonetheless, be held liable for the debt.[2] However, this is not a case where the issue is whether a "home office" of an international bank should be held liable for the debts of

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2. *See e.g., Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1303-04 (1st Cir. 1988); *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 863 (2d Cir. 1981), *cert. denied* 459 U.S. 976 (1982); *First Nat'l. Bank of Boston (Int'l.) v. Banco Nacional de Cuba*, 658 F.2d 895, 900 (2d Cir. 1981), *cert. denied*, 459 U.S. 1091 (1982); *Trinh v. Citibank, N.A.*, 850 F.2d 1164, 1168 (2d Cir. 1988), *cert. denied*, 496 U.S. 912 (1990).

affiliated foreign banks that have closed or are in default. Consequently, since liability for an obligation owed to a depositor is not an issue, the holdings of the *Sokoloff* line of cases are unsuited to the facts of this case.

Moreover, *Sokoloff*, is in direct conflict with a line of federal decisions holding that a branch bank is not a mere "teller's window," but a separate business entity. *Pan-American Bank & Trust Co. v. National City Bank*, 6 F.2d 762, 767 (2d Cir. 1925), *cert. denied*, 259 U.S. 554 (1925). Accordingly, petitioner requests that this Court respectfully resolve the conflict.

Under federal common law, branch banks often have been considered to be separate entities from their parent banks. *See, e.g., Banco Nacional de Cuba v. Chase Manhattan Bank*, 505 F. Supp. 412, 444 (S.D.N.Y. 1980), *modified on other grounds*, 658 F.2d 825 (2d Cir. 1981) (branches of Chase Manhattan Bank and Citibank treated as independent entities for valuation purposes); *Det Bergenske Dampkibsselskab v. Sabre Shipping Corp.*, 341 F.2d 50, 53 (2d Cir. 1965) (an attempted foreign attachment of a bank account at a New York branch office was ineffective; "a branch bank is a separate and distinct business entity"); *Republic of China v. National City Bank of New York*, 208 F.2d 627, 630-31 (2d Cir. 1953), *rev'd. on other grounds*, 348 U.S. 356 (1955) ("a national bank and each of its foreign branches are separate entities, to be treated as if they were unrelated banks with respect to the business done between them and for many other purposes"); *Marlboro Trust Co. v. Elliot*, 86 F.2d 315, 316 (4th Cir. 1936) ("branches of the same bank are to be treated just as though they were

independent banks" for purposes of collection on checks).[3]

Moreover, the holding in *Sokoloff* was specifically limited to its facts in *McGrath, Attorney General v. Agency of Chartered Bank of India*, 104 F. Supp. 964, 968 (S.D.N.Y. 1952), *aff'd.*, 201 F.2d 368 (2d Cir. 1953), as follows:

> [*Sokoloff*] is authority merely for the principle that in factual situations as presented in that case the various branches will be considered a part of a single corporation. It does not stand for the principle that in every instance an international bank with branches is but one legal entity for all purposes . . . . [T]here are purposes for which the various agencies and branches of Chartered Bank may be treated in law as separate entities. I fail to see the applicability of *Sokoloff* either as a guide to or authority for resolution of this problem. The facts before me and the cases catalogued supra lend weight to the view that we are dealing here with Agencies independent of one another.

Id. at 968 (emphasis in original).*See also, U.S. v. Harvey*,63 AFTR 2d (P-H) 89-1236, ¶ 89-538 (S.D.Fla. 1989) (at a minimum, allegations regarding the affiliation between branch

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3. State courts in New York, where the *Sokoloff* line of cases originated, have reached similarly opposite findings. *See, e.g., Clinton Trust Co. v. Compania Azucarera Central Maboy S.A.*, 14 N.Y.S.2d 743 (1939) (accounts deposited in a branch in Cuba not considered property of a bank located in New York).

banks and their foreign parents raise an issue of fact requiring an evidentiary hearing. Importantly, this case involved BCCI)

Thus, Petitioner respectfully submits that, at a minimum, an evidentiary hearing is necessary to inquire into whether, under the law of Macau, the former Macanese bank should be treated as an entity separate from the BCCI Criminal Defendants and whether the particular assets as issue were properly forfeited where: (a) the deposits of the Macau bank were negotiated in bilateral contractual agreements between the Macau bank and the corresponding U.S. banks ; (b) these deposits could only be withdrawn by the same Macau bank after disclosure of the appropriate test keys; (c) under Macau law, assets booked in a Macanese affiliate of a foreign bank, such as the BCCI Criminal Defendants, may neither be used to meet obligations of the foreign bank incurred abroad, nor may foreign judgment of bankruptcy or liquidation against the foreign bank be enforced in Macau before all obligations contracted in Macau have been satisfied; and (d) under Macau law, should the foreign bank fail, local creditors are entitled to funds booked in the Macanese affiliate, not creditors of the home-office. Because the BCCI Criminal Defendants had to agree to submit to the law of the respective foreign jurisdictions as a condition for establishing affiliated foreign banks and it is that law which determines whose right, title and/or interest is superior, *See Vishipco Line*, 660 F.2d at 859, Petitioner respectfully submits that, under these conditions, forfeiture was not appropriate.

C. Whether Application of the Law of Macau Would Undermine a Federal Statute, Respectfully, Should Be Decided By This Court?

The Appellate Court found that penal statutes should be uniformly enforced, without regard to the vagaries of state law. *See U.S. v. BCCI Holdings (Luxembourg), S.A.*,48 F.3d 551, 554 (D.C. Cir. 1995). Moreover, the Appellate Court determined that the purpose of this policy was to ensure that "identically situated parties" do not receive arbitrarily different treatment under the same statutory scheme. *Id.*

Petitioner respectfully submits, however, that rejection of Macanese law based on this conclusion is inappropriate and raises important issues of federal law because it is precisely the question of whether Petitioner is to be situated with the BCCI Criminal Defendants that is at issue. If Petitioner were a wholly owned subsidiary incorporated in a different state, then the District Court would have properly looked to the law of the state in which the subsidiary was incorporated for guidance in determining whether to hold the subsidiary liable for the acts of its parent. *Futurology Impex Corp. v. International Trade Group, Inc.*, 1987 WL 42086 (E.D.N.Y. Dec. 19, 1987). The inquiry here should be no different simply because international banks generally operate in foreign countries through separately chartered, capitalized and managed banks licensed by and subject to the laws of the particular jurisdiction in which they operate. Peter S. Smedresman & Andreas F. Lowenfeld, *Eurodollars, Multinational Banks, and National Laws*, 64 *N.Y.U. L. Rev.*, 733, 741 (1989).

Moreover, the Appellate Court's approach does not, respectfully, take into consideration the unique, international aspect of this particular matter and the concerns of international comity it raises. Petitioner is not requesting that the criminal laws of the United States be ignored. Rather, Petitioner is requesting that This Court recognize that the Macanese Government -- a foreign sovereign in its own right -- has taken legal action of its own to protect its local depositors and creditors and that principles of international comity require that the legislative, executive or judicial acts of another sovereign nation should be followed. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895); *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522, 543 n. 27 (1987). The appointment of Petitioners by their respective foreign governments is, respectfully, exactly the type of act by a foreign sovereign that must, respectfully, be recognized and respected under the principles of international comity. *Aerospatiale*, 482 U.S. 543 n. 27; *Hilton*, 159 U.S. at 164. However, the U.S. Government's seizure of the accounts at issue and the District Court's and the Appellate Court's rejection of the Liquidation Commission's petition by equating it with the BCCI Criminal Defendants, has frustrated Petitioner's ability to carry out its assigned duties as liquidator of the foreign bank at issue, and, thus, violates principals of international comity and does harm to the international legal system as a whole by thwarting the acts of a foreign sovereign.

CONCLUSION

Petitioner respectfully submits, that, because of the important issues of federal law, the apparent conflict between prior decisions of United States Courts of Appeal,

and a state court of last resort, *Sokoloff v. National City Bank of New York*, 130 Misc. 66, 73 224 N.Y.S. 102, 114 (Sup. Ct. 1927), *aff'd. mem.*, 223 App. Div. 754, 227 N.Y.C. 907, *aff'd.*, 250 N.Y. 69, 164 N.E. 745 (1928), concerns of due process and international comity, raised by this matter, and because these important issues present a case of first impression, never before decided by this Court, which case will affect the international banking system, of which American banks are an integral part, that This Court exercise its discretionary power and issue a writ of certiorari.

Dated: August 31, 1995

Respectfully submitted,

Larry Klayman, Esq.
KLAYMAN & ASSOCIATES
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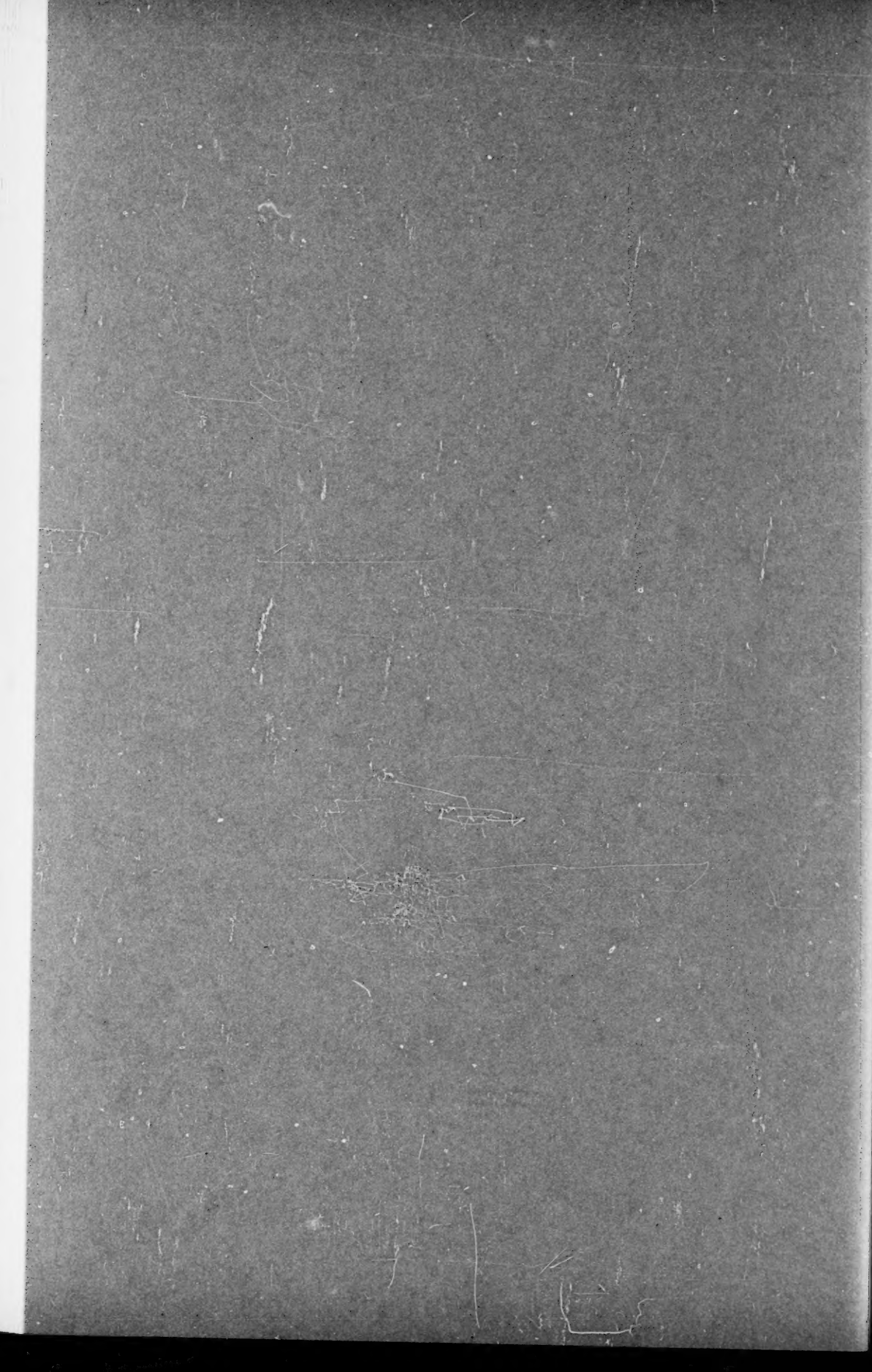
Washington, D.C. 20024
(202) 646-5160



APPENDIX A - JUNE 2, 1995 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ORDER DENYING SUGGESTION FOR REHEARING IN BANC

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-5297

CV 91-0655

UNITED STATES OF AMERICA,

Appellee,

v.

BCCI HOLDINGS (LUXEMBOURG), S.A., et al.,

Appellants.

---

and Consolidated Cases No. 93-5298 and 93-5347

On Appeal From The United States Court District Court
For The District Of Columbia

BEFORE: EDWARDS, Chief Judge; WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, Circuit Judges.

BY THE COURT:

The Suggestion For Rehearing In Banc of appellant in No. 93-5347 has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam

Entered: June 2, 1995
For the Court: Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Deputy Clerk

Circuit Judge Wald did not participate in this matter.

APPENDIX B - JUNE 2, 1995 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ORDER DENYING PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-5297

CV 91-0655

UNITED STATES OF AMERICA,

Appellees,

v.

BCCI HOLDINGS (LUXEMBOURG), S.A., et al.,

Appellants.

---

and Consolidated Cases No. 93-5298 and 93-5347

On Appeal from the United States District Court for the District of Columbia

BEFORE: SILBERMAN, HENDERSON and RANDOLPH, Circuit Judges

BY THE COURT:

Upon consideration of the petition for Rehearing of appellant in No. 93-5347, filed April 17, 1995, it is

ORDERED, by the court, that the petition is denied.

Per Curiam

Entered: June 2, 1995
For the Court: Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Deputy Clerk

APPENDIX C - MARCH 3, 1995 JUDGMENT AND JUNE 14, 1995 MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-5297

CV 91-0655

UNITED STATES OF AMERICA,

Appellees,

v.

BCCI HOLDINGS (LUXEMBOURG), S.A., et al.,

Appellants.

---

and Consolidated Cases No. 93-5298 and 93-5347

Appeals from the United States District Court for the District of Columbia

BEFORE: SILBERMAN, HENDERSON, and RANDOLPH, Circuit Judges

JUDGEMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgement of the District Court appealed from in these causes is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Entered: March 3, 1995
For the Court: Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Deputy Clerk

Opinion for the Court filed by Circuit Judge Henderson.

ISSUED AND MANDATED: 6/14/95

APPENDIX D - APPELLATE COURT DECISION, 48 F. 3d 552 DISTRICT OF COLUMBIA CIRCUIT

United States Court Of Appeals
For The District of Columbia

No. 93-5297

UNITED STATES OF AMERICA,

Appellee,

v.

BCCI HOLDINGS (LUXEMBOURG), S.A., et al.,

Appellees,

BANCO CENTRAL DEL PARAGUAY,

Petitioner-Appellant,

No. 93-5298

UNITED STATES OF AMERICA,

Appellee.

v.

2d

BCCI HOLDINGS (LUXEMBOURG), S.A., et al.,

Appellees,

ABDULLAH SOYDAS, AS LIQUIDATOR OF BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LTD., ISTANBUL, IZMIR AND MERSIN, TURKEY,

Appellant.

No. 93-5347

UNITED STATES OF AMERICA,

Appellee,

v.

BCCI HOLDINGS (LUXEMBOURG), S.A., et al.,

Appellees,

THE LIQUIDATION COMMISSION FOR BCCI (OVERSEAS) LTD., MACAU BRANCH,

Appellant.

Appeal from the United States District Court
for the District of Columbia
(91cv0655)

Argued November 23, 1994
Decided March 3, 1995

For Appellants: LARRY KLAYMAN, on brief was ALLEN LESCHT. WAYNE S. BISHOP also entered an appearance.

For Appellees: LLOYD H. RANDOLPH, ATTY., DEPT. OF JUSTICE, on brief were ERIC H. HOLDER, JR., U.S. ATTY., and ROBERT D. SHARP, STEFAN D. CASSELLA and JAMES C. KOHN, ATTYS., DEPT. OF JUSTICE.

Opinion by: Hon. Karen LeCraft Henderson

The appellants are liquidators for the Paraguayan, Turkish and Macanese branches of the Bank of Credit and Commerce International (Overseas) Limited (BCCI Overseas). Each liquidator appeals the district court's dismissal of its petition under 18 U.S.C. § 1963 (l)(2) for adjudication of its interests in financial accounts located in this country and ordered forfeited pursuant to 18 U.S.C. § 1963 and to its parent bank's pleas agreement. The district court held that the branches lacked statutory standing to file the petitions because they are not parties "other than" defendant BCCI Overseas, as required under section 1963 (l)(2). We affirm that dismissal.[1]

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1 Because the appellants lack standing to file a section 1963(l)(2) petition, we do not address their contentions that they are entitled to a hearing on their petitions and that certain assets are not subject to forfeiture under section 1963.

On January 24, 1992 the district court accepted pleas of guilty on behalf of BCCI Overseas and three related banking entities [2] on charges of violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (RICO). The same day the court entered an order under 18 U.S.C. § 1963, pursuant to a plea agreement, requiring that the same four entities forfeit to the United States their interests in any property located in this country except for assets transferred here by court-appointed liquidators in the course of liquidation.[3] The Government then published notice of the forfeiture order in eleven major American newspapers and sent individual notices to over 340 entities, in compliance with 18 U.S.C. § 1963(l)(1).[4] In response, various parties representing bank branches and depositors, including the

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[2] They are BCCI Holdings (Luxembourg), S.A.; Bank of Credit and Commerce International, S.A.; and International Credit and Investment Company (Overseas) Limited.

[3] For a more detailed account of the events leading up to the forfeiture order, see *United States v. BCCI Holdings (Luxembourg), S.A.*, No. 93-5296 (D.C. Cir. Feb. 14, 1995).

[4] The subsection provides:

> Following entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

18 U.S.C. § 1963(l)(1).

appellant liquidators, filed petitions to establish their interests in forfeited assets pursuant to 18 U.S.C. § 1963(l)(2). By order filed August 19, 1993 the district court dismissed the petitions on the ground that the branches of BCCI Overseas failed to satisfy section 1963(l)(2)'s threshold standing requirement that a petitioner be a party "other than the defendant."[5] We agree with that disposition. Our courts have long recognized that, while individual bank branches may be treated as independent of one another, each branch, unless separately incorporated, must be viewed as a part of the parent bank rather than as an independent entity. In 1927, then Judge Cardozo wrote of bank branches:

> [W]hen considered with relation to the parent bank, they are not independent agencies; they are, what their name imports, merely branches, and are subject to the supervision and control

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[5] The subsection provides in full:

> Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

18 U.S.C. § 1963(l)(2). Subsection (l)(6) provides that if the court determines after the hearing that a petitioner had at the time of the illegal activity an interest in forfeited property superior to the defendant's or subsequently acquired property as a bona fide purchaser, it is to amend the forfeiture order accordingly.

> of the parent bank, and are instrumentalities whereby the parent bank carries on its business, and are established for its own particular purposes, and their business conduct and policies are controlled by the parent bank, and their property and assets belong to other parent bank, although nominally held in the names of the particular branches.

Sokoloff v. National City Bank of N.Y., 224 N.Y.S. 102, 114 (Sup. Ct. 1927), *aff'd without opinion*, 227 N.Y.S. 907 (N.Y. App. Div. 1928), *aff'd*, 164 N.E. 745 (N.Y. 1928). Relying on the *Sokoloff* rule that a branch is a mere component of its parent, federal courts have repeatedly held parent banks accountable for the debts of their branches. *See, e.g., Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1303-04 (1st Cir. 1988); *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 863 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); *First Nat'l Bank of Boston (Intl) v. Banco Nacional de Cuba*, 658 F.2d 895, 900 (2d Cir. 1981), *cert. denied*, 459 U.S. 1091 (1982); *Trinh v. Citibank, N.A.*, 850 F.2d 1164, 1168 (6th Cir. 1988), cert denied, 496 U.S. 912 (1990).[6] We find that rule, which has become a part of

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[6] Authority cited by the appellants to support the independent status of branch banks is inapposite here. The cited cases merely treat branches like independent banks in discrete, narrow contexts unrelated to the branches' juridical status and often involving transactions between the bank and its branch. *See Det Bergenske Dampskibsselskab v. Sabre Shipping Corp.*, 341 F.2d 50, 53-54 (2d Cir. 1965) (foreign branch separate from parent for determinig jurisdction to attach its assets; *Repbulic of China v. National City Bank of N.Y.*, 208 F.2d 627 (2d Cir. 1953) (sovereign nation's debt to foreign branch of domestic parent banks is "separate" from domestic transaction with parent so that suit by foreign soveregin to recover on the latter does not waive its soveregin immunity

our federal common law, to be controlling here. Accordingly, we conclude that the branches represented by the appellants have no separate legal identity apart from their parent, defendant BCCI Overseas, and therefore are not parties "other than the defendant" authorized to file petitions under section 1963 (l)(2). Nevertheless, the appellants argue we should ignore the Sokoloff rule for two reasons. We find neither persuasive.

First, the appellants assert that, as legally authorized liquidators, they have interests separate from the institutions they represent and therefore from the four BCCI defendants as well. A bank liquidator, however, stands in the shoes of the bank it represents and enjoys precisely the same rights and interests. *Trigo v. FDIC*, 847 F.2d 1499, 1501 (11th Cir. 1988); *FDIC v. Glickman*, 450 F.2d 416, 418 (9th Cir. 1971); *Commonwealth ex rel. Sheppard v. Central Penn Nat'l Bank*, 375 A.2d 874, 877 (Pa. Commw. Ct. 1977) (citing *Commonwealth ex rel. Kelly v Commonwealth Mutual Ins. Co.*, 299 A.2d 604, 606 (Pa. 1973); *In re International Milling Co.*, 181 N.E. 54, 56 (N.Y. 1932); *Hammons v. Grant*, 225 P. 485, 486-87 (Ariz. 1924). Thus, in their

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from suit based on the former); *Marlboro Trust Co. v. Ellliott*, 86 F.2d 315, 316-17 (4th Cir. 1936) (check drawn on distant branch accorded same preferential status under South Carolina codification of Uniform Collection Code as one drawn upon another bank); *Pan-American Bank & Trust Co. v. National City Bank of N.Y.*, 6 F.2d 762, 767 (2d Cir.) (branch treated same as independent bank when presenting paper to parent bank), *cert. denied*, 269 U.S. 554 (1925); *Banco Nacional de Cuba v. Chase Manhattan Bank*, 505 F. Supp. 412, 444 (S.D.N.Y. 1980) (branch separate from parent for "value-related purposes"), *modified in other respects*, 658 F.2d 875 (2d Cir. 1981).

capacities as branch liquidators the appellants have no more standing to file the petitions than do the branches they represent.

Second, the appellants contend we should apply the law of each branch's domicile rather than the federal common-law rule derived from *Sokoloff* to determine whether that branch operates independently from its parent bank. In so urging, the appellants rely on the principle that a federal court should apply the law of the jurisdiction with the "greatest interest" in the litigation and its outcome, which in this case, they maintain, is the domicile of the depositors who will suffer financial loss as a result of the forfeiture. This argument ignores the obvious; the depositors stand to lose no more if the assets are forfeited than the United States will lose if they are not. In any event, we believe precedent dictates that United States federal common law govern the forfeiture of assets located within its borders and acquired or maintained in the course of racketeering activities that violate its statutes.

The Supreme Court has repeatedly held that federal penal statutes should be uniformly enforced, without regard to the vagaries of state law, unless Congress has revealed a clear intent to the contrary. *See e.g., Taylor v. United States*, 495 U.S. 575 (1990) (refusing to adopt state definitions of "burglary" in applying federal sentencing enhancement statute); *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 118-21 (1983) (subjecting individual to federal statute's firearms disability despite state law "expunction" of his felony guilty pleas); *United States v. Turley*, 352 U.S. 407, 410-11 (1957) (rejecting state law definitions of "stolen" in construing the National Motor Vehicle Theft Act). The reason for this policy is clear: identically situated parties should not

arbitrarily receive different treatment under the same federal statutory scheme. *See Taylor*, 495 U.S. at 591 (noting that if individual state definitions of burglary were accepted "a person imprudent enough to shoplift or steal from an automobile in California would be found . . . to have committed a burglary constituting a 'violent felony' for enhancement purposes - yet a person who did so in Michigan might not" and declining to 'interpret Congress' omission of a definition of 'burglary' in a way that leads to odd results of this kind.") (citing *Dickerson*, 460 U.S. at 119-120; *Turley*, 352 U.S. at 411). The same reasoning governs here. The language of RICO itself shows Congress intended consistent and uniform enforcement of the forfeiture provisions, without regard to local law. *See* 18 U.S.C. § 1963(a) (requiring forfeiture of eligible assets "irrespective of any provision of State Law"). To construe section 1963(l)(2) in light of the divergent laws of foreign nations would frustrate that intent and we decline to do so. Accordingly, we apply the federal common-law rule and treat the bank branches as components of their parent defendant bank.

For the preceding reasons, we conclude that the appellants lack standing to file petitions under 18 U.S.C. § 1963(l)(2). To the extent that the forfeitures may work a hardship on the bank branches or their depositors, the "appropriate ex[cl]usive remedy" is to seek equitable relief from the Attorney General under 18 U.S.C. § 1963(g)(1).[7]

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[7] That section authorizes the Attorney General to "grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interests of justice and which is not inconsistent with the provisions of [RICO]."

United States v. BCCI Holdings (Luxembourg), S.A., No. 93-5296 (D.C. Cir. Feb. 14, 1995) (quoting S.Rep No. 225, 98th Cong., 2d Sess. 208)). Accordingly, the decision of the district court dismissing the petitions is

Affirmed.

APPENDIX E - DISTRICT COURT DECISION, 833 F. SUPP. 32 DISTRICT OF COLUMBIA CIRCUIT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 91-0655

UNITED STATES OF AMERICA,

v.

BCCI HOLDINGS (LUXEMBOURG), S.A., ET AL.,

Presently pending are the United States' motions to dismiss the petitions for hearings to adjudicate interests in forfeited property filed by **The Central Bank of Paraguay** ("Paraguayan branch"), **Raymond Davies on behalf of all BCCI depositors in Sierra Leone** ("Davies"), **Carlos F. Sanchez Fabrega as Liquidator of BCCI (Overseas) Limited (en Liquidacion) in Panama**[1] (Panamanian branch"), **Andre Forde and Michel Chavaux, Administrators of BCCI (Overseas) Limited in France and Monaco** (" French branch), **The Government of the People's Republic of Bangladesh and**

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[1] Mr. Fabrega was subsequently replaced by Edgardo Sigfredo Lasso Valdes as the liquidator of the Panamanian branch.

Bangladesh Bank[2] ("Bangladesh"), **Hussein Abdel Rahim *et al.*, Joint Official Liquidators for BCCI (Overseas) Limited, Sudan** ("Sudanese Branch"), **Antonio dos Santos Ramos and Antonio Maria Ho as the Liquidation Commission for BCCI (Overseas) Limited, Macau Branch**[3] ("Macanese branch"), and **Abdullah Soydas, as Liquidator of BCCI (Overseas) Limited, Istanbul, Izmir and Mersin, Turkey** ("Turkish branch").[4] Upon consideration of the motions to dismiss, all filings relating thereto, and oral argument presented at the June 22 and 23, 1993 hearings, the motions to dismiss the petition as filed by branches of BCCI (Overseas) Limited are granted and the motions to dismiss the petitions filed by Bangladesh are denied.

BACKGROUND

On July 5, 1991, bank regulators in the principal

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[2] Because Bangladesh Bank asserts interestS in forfeited property as an agent of the Government of the People's Republic of Bangladesh, those two petitioners will be treated as one entity for the purpose of resolving the government's motions to dismiss.

[3] Dr. Ramos and Mr. Ho were subsequently replaced by Antonio Correia.

[4] Although the government filed a motion to dismiss the petition filed by the State Bank of India on behalf of the Bombay branch of BCCI (Overseas), resolution of the motion has been temporarily stayed at the request of the petitioner in light of ongoing settlement attempts. *See* June 18, 1993 Order Granting Request for Adjournment; July 20, 1993 Order Granting Further Adjournment. A petition filed by another branch of BCCI (Overseas), the Jamaican branch, was voluntarily withdrawn in June 1993.

jurisdictions in which the four corporate defendants[5] were organized or did business jointly instituted a worldwide shutdown of the banks upon the belief that they were insolvent and had engaged in numerous criminal activities. Subsequently, courts in the respective domiciles of the defendants appointed liquidators to collect all BCCI assets located throughout the world and to distribute the assets to lawful creditors and depositors of BCCI on a global basis.

On January 24, 1992, this Court, following findings of fact and conclusions of law with supporting reasons made in open court, accepted the pleas of guilty of made by the court-appointed liquidators on behalf of the BCCI entities and the plea agreement between them and the United States of America. Thereupon, and in accordance with 18 U.S.C. § 1963, an Order of Forfeiture was entered. Paragraph 1(e) of the Order provides that the corporate defendants named in this action shall forfeit to the United States ownership interests in all property located in the United States, including, without limitation, real property and all tangible and intangible personal property, however held, whether subsequently identified, determined or discovered in the course of the ongoing liquidation proceedings described therein or otherwise identified, determined, or discovered in any manner at any time, but not property that may be brought into the United States by or on behalf of court-appointed fiduciaries of BCCI in

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[5] The four corporate defendants are BCCI Holdings (Luxembourg), S.A., incorporated under the laws of Luxembourg; Bank of Credit and Commerce International, S.A., incorporated under the laws of Luxembourg; Bank of Credit and Commerce International (Overseas) Limited ("BCCI Overseas") incorporated under the laws of the Cayman Islands; and International Credit and Investment Company (Overseas) Limited, incorporated under the laws of the Cayman Islands. The four entities are collectively referred to as "BCCI."

the course of the management or disbursement of the liquidation estates as described in the plea agreement. Attached to the January 24, 1992 Order as Exhibit A was a list of specific BCCI accounts, with corresponding numbers, names, and approximate balances, which the United States Marshals Service was directed to seize forthwith. Because the government was unable to verify certain information concerning additional forfeitable accounts at the time the Order of Forfeiture was entered, the Court issued a supplemental Order on January 31, 1992 which directed immediate seizure of the specific assets listed therein. In accordance with the plea agreement, approximately half of the forfeited funds will be placed in a Worldwide Victims and Creditors Compensation Fund maintained by the court-appointed liquidators of the corporate defendants. The remaining half will be used by the United States to reimburse federal banking agencies' insurance funds and to minimize the risk of loss arising from BCCI's illegal acquisitions of certain Untied States banks.

In satisfaction of 18 U.S.C. § 1963(*l*)(1), and to inform third parties of potential rights to seek recovery of assets declared forfeited,
the United States published notice of the Order of Forfeiture, as amended, during the period between February 13, 1992 and March 27, 1992 in eleven major United States newspapers including the *Wall Street Journal,* the *New York Times,* the *Chicago Tribune* and the *Los Angeles Daily Journal*. *See* Governments' Compliance with Order of May 8, 1992, filed May 12, 1992. In addition, personal notice was sent to over 340 persons and entities as late as April 3, 1992. *Id.*

On March 19, 1992, the French, Panamanian, and Paraguayan branches of BCCI Overseas filed separate petitions seeking the return of funds forfeited from accounts held in their

names at institutions in New York. Although all three concede that they were not separately incorporated, they claim to be separate juridical entities under the laws of their domiciles. Accordingly, the branches argue that they are third parties to this litigation, that they are not bound by the plea agreement entered by their parent, and that funds held in their name were not owned by BCCI Overseas and cannot be forfeited absent specific proof tracing the assets to illegal activities. The Macanese, Sudanese, and Turkish branches filed similar petitions on April 12, 1992, May 11, 1992, and June 10, 1992 respectively.

Unlike the above-mentioned petitions, the April 27, 1992 and April 3, 1992 claims of Raymond Davies and Bangladesh were not filed on behalf of branches of BCCI Overseas; Davies' petition was filed on behalf of all depositors of the Sierra Leonean branch and Bangladesh's petition was submitted on behalf of the sovereign nation itself. Bangladesh seeks to recover the funds held in branch accounts based on allegations that it had the right to hold all foreign exchange acquired by the branches, that the branches could not dispose of foreign exchange without its express permission, and that the branches have not received such permission with respect to the forfeited assets.

In accordance with a briefing schedule set by the Court, the government filed motions to dismiss the petitions based on theories that as mere branches of one of the corporate defendants, none of the claimants had standing to appear before this Court and that none of the petitioners could satisfy the substantive prerequisites for court-ordered relief. Additionally, the government contended that the Paraguayan branch's petition was defective because it sought to recover an interest in assets which were not yet seized. The government further contended that no petition filed by a

liquidator, including the claim filed by Mr. Davies, could assert derivative claims of depositors and that the petitions of the Sudanese and Turkish branches were filed out of time.

On June 24, 1992, the government filed a Motion to Amend Order of Forfeiture to Include Additional Property, seeking forfeiture and seizure of assets in newly discovered bank accounts held in the names of the corporate defendants, proceeds from the sale of a condominium purchased with resources provided by a corporate defendant, money remaining in a "BCCI Legal Fund" established by one of the corporate defendants for the defense of its employees' legal interests, a bankruptcy distribution to one of the corporate defendants, and assets held at various New York financial institutions in the name of ICIC Investments Ltd., a sibling corporation of defendants ICIC (Overseas) Ltd. The Court granted the government's motion and issued an Order of Forfeiture on July 29, 1992. The United States subsequently provided notice of the Order to potential claimants.[6]

In response to the July 1992 Order of Forfeiture, Bangladesh filed a second petition asserting interests in newly forfeited and seized property held in the names of Bangladesh branches of BCCI Overseas. The government subsequently filed a motion to dismiss Bangladesh's new petition, which became ripe on June 18, 1993. Although the new
Order of Forfeiture also directed the seizure of property held in the name of the Paraguayan branch, that branch failed to file a second petition in response to the Order and apparently believed that its first petition sufficiently raised a claim to those assets.

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[6] Over 100 petitions to amend the two Orders of Forfeiture have been filed as of this date.

Hearings on the government's motions to dismiss what the government termed the "branch petitions" were scheduled in a May 12, 1992 Order which provided, "The litigants shall be prepared to present both legal arguments and relevant factual evidence, including testimony and /or documentation relating to the nature of the relationship between the petitioners and Bank of Credit and Commerce International (Overseas) Limited." Five days later, the government filed a motion *in limine* seeking an Order excluding the presentation of, *inter alia*, factual evidence and testimony of foreign law. The government claimed that such evidence and testimony were irrelevant to resolution of the motions to dismiss. After considering opposition filed by some of the petitioners, the government's motion *in limine* was granted. The Court, however, warned, "In the event that the legal arguments contained in the government's motions to dismiss are rejected, additional hearings will be scheduled and the petitioners will be allowed to present relevant evidence in support of their claims." May 27, 1993 Order Modifying May 12, 1993 Order Setting Hearings on "Branch" Petitions at 3.

All petitioners were invited, though not required, to participate in the oral argument scheduled for June 21, 22, and 23, 1992. All petitioners addressed herein except for the French and Turkish branches accepted the invitation.

DISCUSSION

Title 18, United States Code, § 1963 sets forth an orderly procedure by which third parties seeking to recover interest in forfeited property may obtain judicial resolution of their claims. The provision granting standing to parties seeking to amend an order of forfeiture to exclude certain property states:

> Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice..., whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property.'

18 U.S.C. § 1963 (*l*)(2). Section 1963 (*l*)(6) sets forth the substantive elements which a third party must establish to successfully obtain amendment of an order of forfeiture and provides in full:

> If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that -
>
> > (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of the purchase reasonably without cause to believe that the property was subject to forfeiture under this section;
>
> the court shall amend the order of forfeiture in accordance with its determination.[7]

Only by establishing standing and satisfaction of all requisite elements of either § 1963 (*l*)(6)(A), or (B) may a party obtain judicial relief from an order of forfeiture. *See United States v. Schwimmer*, 968 F.2d 1570, 1584 (2d Cir. 1992) ("The *only* role of the District Court is to amend the order of forfeiture where a genuine property interest of the sort specified in § 1963 (*l*)(6) is demonstrated.") (emphasis in the original); *United States v. Lavin*, 942 F.2d 177, 187 (3d Cir. 1991) ("Those third parties who fall outside of the [limited avenues of relief], regardless of how sympathetic they are, must petition the Attorney General for relief.") If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing. *See United States v. Campos*, 859 F.2d 1233, 1240 (6th Cir. 1988);

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[7] Title 18 U.S.C. § 1963 (*l*)(6) contains exactly the same language as 21 U.S.C. § 853 (n)(6), the statute providing for forfeiture in criminal narcotics cases, and it appears that no court has interpreted these two provisions differently. Because the two subsections are identical and because of the relative dearth of caselaw interpreting and applying § 1963(*l*), the Court's opinion relies on reasoning contained in § 853 (n) cases as well as in § 1963 (*l*) cases.

United States v. Mageean, 649 F. Supp. 820, 825 (D. Nev. 1986), *aff'd without opinion*, 822 F.2d 62 (9th Cir. 1987); S. Rep. No. 225, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 3374, 3391.

In its motions to dismiss the branch petitions, the government argues, *inter alia*, that because branches of BCCI Overseas are not separately incorporated, they cannot, as a matter of federal law, be considered separate juridical entities. Consequently, the government contends, the branches must be declared "defendants" within the meaning of § 1963(*l*)(2) and are therefore barred from asserting interests in property ordered forfeited. Most of the petitioners assert that foreign law, rather than federal common law, should govern whether they are separate entities and claim that under the laws of their domiciles, they maintain existences wholly separate from BCCI Overseas. In the alternative, the petitioners argue that under accepted principles of federal and state common law, whether a branch of a bank is an entity separate from its parent is a complex question of fact which can only be resolved after the presentation of evidence relating to numerous factors. Bangladesh and Davies argue that issues relating to the status of bank branches are irrelevant to resolution of their petitions since they claim interests as a sovereign nation and a representative of general depositors and creditors rather than as branches of BCCI Overseas.

Because the meaning of a term contained in a federal criminal statute is at issue, and because Congress has not expressed an unambiguous intent to the contrary, federal common law, rather than the law of the foreign countries in which the branches are domiciled, will govern whether the petitioners are "defendants" for purposes of determining whether they have standing to file petitions. *See Taylor v. United States*, 495 U.S.

575, 110 S.Ct. 2143, 2154 (1990) (state definitions of "burglary" should not control whether a federal sentencing enhancement provision should apply); *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119-20, 103 S.Ct. 986, 995 (1983) ("application of federal legislation is nationwide and at times the federal program would be impaired if state law were to control"); *United States v. Turley*, 352 U.S. 407, 411, 77 S.Ct. 397, 399 (1957) ("[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law.").

Under federal common law, whether a bank branch should be treated as an independent entity and whether that question is a matter of fact or law depends upon the context of the litigation in which the issues arise. For example, in actions involving two different branches of the same parent, courts have held that the branches can be considered entities independent of each other for specific purposes. *See, e.g., Det Bergenske Dampskibsselskap v. Sabre Shipping Corp.*, 341 F.2d 50, 53-54 (2d Cir. 1965) ("[A] warrant of foreign attachment,
served on a branch office located in the Eastern District of New York, is ineffective to garnishee a bank account at a branch office of the same bank located in the Southern District of New York."); *United States v. Harvey*, 1989 W.L. 109079 (S.D. Fla.) (whether Miami agency of BCCI should be considered separate from Panamanian branch of BCCI for purposes of enforcing tax levy was an issue of fact which prevented resolution of the dispute on summary judgment); *McGrath v. Agency of Chartered Bank of India, Australia & China*, 104 F. Supp. 964 (S.D.N.Y. 1952) (New York and German branches considered different entities for purposes of determining whether setoff was available), *aff'd without opinion*, 201 F.2d 368 (2d Cir. 1953); *Clinton Trust Co. v. Compania Azucarera Central Mabay S.A.*, 14 N.Y.S.2d

743 (Sup.Ct.N.Y.Cty. 1939) (accounts deposited in a branch in Cuba could not be considered to be property situated with a branch located in New York). More significant to this litigation, however, are the cases involving disputes over the legal relationship between a branch and its parent. The substantial majority of those cases hold that though a parent may be able contractually to shield itself from certain debt obligations incurred by its branches, branches are not entities separate from their parents. *See, e.g., Trinh v. Citibank, N.A.*, 850 F.2d 1164, 1168 (6th Cir. 1988) ("[I]t is a general banking principle that the home office is *ultimately liable* on a deposit placed in its foreign branch if, as here, the branch closes or otherwise wrongfully refuses to return a deposit.") (emphasis in original), *cert. denied*, 496 U.S. 912 (1990); *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1304 (2d Cir. 1988) ("When a branch is closed, the depositor has a claim against the parent bank; the situs of the debt represented by the deposit 'springs back' to the home office. Ultimate liability for the debt of a branch rests upon the parent bank."); *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 863 (2d Cir. 1981) ("By operating in Saigon through a branch *rather than through a separate corporate entity*, Chase accepted the risk that it would be liable elsewhere for obligations incurred by its branch.") (emphasis added), *cert. denied*, 459 U.S. 976 (1982). These cases rely in substantial part on the landmark case of *Sokoloff v. National City Bank of New York*, 224 N.Y.S. 102, 114 (Sup.Ct.N.Y.Cty. 1927), *aff'd without opinion*, 227 N.Y.S. 970, (N.Y.App.Div.1), *aff'd*, 250 N.Y. 69 (1928), which held:

> Where a bank maintains branches, each branch becomes a separate business entity, with separate books of account. A depositor in one branch cannot issue checks or drafts upon another

> branch or demand payment from such other branch, and in many other respects the branches are considered separate corporate entities and as distinct *from one another* as any other bank. *Nevertheless, when considered with relation to the parent bank, they are not independent agencies*; they are, what their name imports, merely branches, and are subject to the supervision and control of the parent bank, and are instrumentalities whereby the parent bank carries on its business, ... and their property and assets belong to the parent bank, although nominally held in the names of the particular branches. *Ultimate liability for a debt of a branch would rest upon the parent bank.*

(emphasis added and citations omitted).[8] Given that the issue currently facing this Court involves relationships between branches and their parent rather than relationships between the branches themselves, it is appropriate to conclude, based on *Sokoloff* and its progeny, that branches of BCCI Overseas are part of that "defendant" as a matter of law and that the branches therefore do not have standing under § 1963(*l*)(2).

Lending strong support to this determination are

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[8] Although BCCI Overseas was not chartered by this country, it is worth noting that the United States chartered banks and their branches have been declared to be single entities under the Federal Foreign Banking Law, codified at 12 U.S.C. §§ 601 et seq. See, e.g., First Nat'l Bank of Boston (International) v. Banco Nacional de Cuba, 658 F.2d 895, 900 (2d Cir. 1981) ("[F]ederal law regards a national bank and its branches as a single entity."), *cert. denied*, 459 U.S. 1091, 103 S. Ct. 579, 74 L. Ed. 2d 939 (1982).

analogous cases which hold that unincorporated divisions of a parent corporation cannot be indicted or sued. *See United States v. ITT Blackburn Co., a Div. of ITT*, 824 F.2d 628, 631-32 (8th Cir. 1987) (acknowledging that "an unincorporated division cannot be sued or indicted, as it is not a legal entity," and recognizing that "when a corporation is properly made a party to litigation, then any unincorporated division may also be liable"); *Western Beef, Inc. v. Compton Inv. Co.*, 611 F.2d 587, 590 (5th Cir. 1980) (unincorporated division "not a separate legal entity wholly apart form its owner"); *In re Sugar Industry Antitrust Litigation*, 579 F.2d 13, 18 (3d Cir. 1978) ("A division of a corporation is not a separate entity but is the corporation itself."); *Salzstein v. Bekins Van Lines, Inc.*, 747 F. Supp. 1281, 1282 n. 1 (N.D. Ill. 1990) ("[B]y definition a corporate division is not a separate legal entity and hence is not suable ...."). Because unincorporated divisions and their parents cannot be considered separate entities for the purpose of indictment, it would be anomalous to consider them separate entities for the purpose of determining standing to file a petition pursuant to § 1963(l).[9]

Although the Davies petition was filed on behalf of depositors of the Sierra Leonean branch rather than on behalf of the branch itself, the petition is defective because general depositors, as unsecured creditors of a defendant, cannot assert valid claims to forfeited funds.[10] Simply put, unsecured creditors

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[9] Because of the dismissal of the branch petitions for lack of standing it is unnecessary to address the government's other asserted bases for dismissal, including Paraguay's failure to file a petition responsive to the July 29, 1993 Order of Forfeiture.

[10] In light of the conclusion that depositors cannot successfully seek amendment of an order of forfeiture, it is unnecessary to resolve the government's assertion that Davies cannot file claims on behalf

like the Sierra Leonean depositors cannot assert interests "in property which has been ordered forfeited"

as required by § 1963(*l*)(2), cannot claim interests in property that "[were] vested in the petitioner rather than the defendant or [were] superior to any right, title, or interest of the defendants" as required by § 1963(*l*)(6)(A), and cannot be considered "bona fide purchaser[s] for value of the right[s], title[s], or interest[s] in the property" as required by § 1963(*l*)(6)(B). *See* Order Dismissing the August 21, 1992 Petition of Anton Seravaseiyar, the August 25, 1992 Petition of Ahmed Shahriar, the June 22, 1992 Petition of Aqueel Ahmed Siddiqi, and the September 8, 1992 Petition of Margaret Mary White, *United States v. BCCI Holdings (Luxembourg), S.A.*, ___ F. Supp. ___ (D.D.C. 1993); Order Addressing the Government's Motion to Dismiss Petitions of Depositors and Additional Depositors, *United States v. BCCI Holdings (Luxembourg), S.A.*, 814 F. Supp. 106 (D.D.C. 1993).

Notwithstanding the fact that this Court has previously held that interests arising from constructive trusts may be recognized under § 1963(*l*), it is inappropriate to impose such a trust in favor of the Sierra Leonean depositors. One of the most significant motivating factors behind the Court's approval of the plea agreement between the United States and BCCI was the fact that the agreement provided for the creation of a worldwide victims fund so that "innocent victims of BCCI's wrongdoing can recover at least a portion of lost assets in as fair a manner as possible -- equitable, orderly, and expeditious." Transcript of Plea Acceptance and Sentence, January 24, 1992, at 6. The Court expressly recognized, "Because the fund will be administered on a global scale through unified proceedings,

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of others asserting rights, titles or interests in forfeited property.

piecemeal and unfair distribution can be avoided." *Id.* Imposition of a constructive trust in favor of the Sierra Leonean depositors or any other group of depositors could cause disruption of the global liquidation proceedings currently underway. Besides the practical consideration relating to the difficulties of adjudication whether each of the more than 4,500 depositors can establish that they made deposits and that such deposits were forfeited by this Court, imposing a trust would significantly harm the abilities of other BCCI creditors to recover fair portions of lost funds. Consequently, and in accordance with the rationales of *Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, South Dakota v. Nat'l Credit Union*, 961 F.2d 733 (8th Cir. 1992); *Downriver Community Fed. Credit Union v. Penn Square Bank*, 879 F.2d 754 (10th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); and *Bruneau v. Fed. Deposit Ins. Corp.*, 785 F. Supp. 585 (E.D.La.), *aff'd*, 981 F.2d 175 (5th Cir. 1992), a constructive trust in favor of the depositors will not be imposed. Davies' petition is therefore dismissed.

As a sovereign nation, Bangladesh cannot be considered part of BCCI Overseas, and the United States' argument that the petitioner does not have standing because it is a "defendant" within the meaning of § 1963(*l*)(2) is therefore rejected. Besides raising the standing issue, however, the government has also contended that the petitions of Bangladesh should be dismissed because it cannot establish rights, titles or interests in the Bangladeshi branch accounts of BCCI Overseas which were "vested in the petitioner rather that the defendant or [were] superior to any right, title or interest of the defendant" as required by § 1963(*l*)(6)(A).

In its motions to dismiss and at oral argument, the government conceded that state law, rather than federal law,

determines whether a petitioner has a superior or vested legal right, title or interest in forfeited property as required by § 1963(*l*)(6)(A). United States' Motion to Dismiss the L Claims of BCCI(O)'s Foreign Branches filed May 1, 1992, at 19-20; Transcript of June 22, 1993 hearing at 17. In addition, the government and Bangladesh agree that the law of the locality with the strongest interest in the litigation should be applied to determine the validity of the petitioners' asserted property interests. The Court concurs. *See In re Koreag, Controle et Revision, S.A.*, 961 F.2d 341, 350 (2d Cir. 1992) ("The federal common law choice-of-law rule is to apply the law of the jurisdiction having the greatest interest in the litigation."); *Wells Fargo Asia Ltd v. Citibank N.A.*, 936 F.2d 723, 726 (2d Cir. 1992) (same), *cert. denied*, 112 S.Ct. 2990 (1992). The parties disagree, however, as to whether the law of the state of New York or of Bangladesh should apply.

Upon careful consideration of the interests of both jurisdictions,
it is concluded that Bangladeshi law should apply to determine the validity of the petitioners' asserted property interests. At this stage of the litigation, the main issue to be resolved hinges on the relationship between the government of Bangladesh and Bangladeshi branches of a bank incorporated under the laws of the Cayman Island. Based on this fact alone, Bangladesh clearly has a much stronger interest in the application of its law, notwithstanding the fact that the funds in dispute were once located in New York.[11]

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[11] In light of the Orders directing the United States Marshals to seize the funds at issue, it is unlikely that assets are presently located in New York.

Because the Court previously denied Bangladesh the opportunity to present relevant expert testimony regarding foreign law at oral argument, and because its petitions have survived the government's threshold contentions relating to standing, principles of fairness dictate that it be allowed to present such testimony at a hearing. Accordingly, the government's motions to dismiss Bangladesh's petitions are denied, and a brief hearing on the validity and sufficiency of petitioner's asserted interests will be held in accordance with § 1963(*l*)(5). Bangladesh and the United States will be allowed to present evidence and witnesses, including experts on Bangladeshi law, in support of their cases and may cross-examine witnesses presented by the opposing side.

CONCLUSION

For reasons stated above, it is hereby

ORDERED that the petitions filed by the following claimants on the following dates are dismissed:

The Central Bank of Paraguay, filed March 19, 1992;

Raymond Davies on behalf of all BCCI depositors in Sierra Leone, filed on April 27, 1992;

Carlos F. Sanchez Fabrega as Liquidator of BCCI (Overseas) Limited (en Liquidacion) in Panama, filed March 19, 1992;

Andre Forde and Michel Chavaux, Administrators of BCCI (Overseas) Limited in

France and Monaco, filed March 19 1992;

Hussein Abdel Rahim, et al., Joint Official Liquidators for BCCI (Overseas) Limited, Sudan, filed on May 11, 1992

Antonio dos Santos Ramos and Antonio Maria Ho as the Liquidation Commission for BCCI (Overseas) Limited, Macau, filed April 12, 1992; and

Abdullah Soydas, as Liquidator of BCCI (Overseas) Limited, Istanbul, Izmir and Mersin, Turkey, filed June 10, 1992.

It is FURTHER ORDERED that the United States' motions to dismiss the April 3, 1992 and September 4, 1992 petitions of the **Government of the People's Republic of Bangladesh and Bangladesh Bank** are denied. After conferring with each other, counsel for the United States and Bangladesh shall file, on or before September 10, 1993, a joint submission advising the Court of the number and identity of the witnesses each side intends to call at the final hearing and briefly summarizing the anticipated testimony of each witness. The joint submission shall also estimate the amount of time each side believes necessary to fairly *but concisely* present its position at the hearing. Upon receipt of the Joint submission, the Court will schedule a hearing date.

IT IS SO ORDERED

August 19, 1993

/s/JOYCE HENS GREEN
United States District Judge

APPENDIX F - OCTOBER 29, 1993 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ORDER ENTERING FINAL JUDGMENT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 91-0655 (JHG)

UNITED STATES OF AMERICA,

v.

BCCI HOLDINGS (LUXEMBOURG), S.A., et al.,

BEFORE: GREEN, District Judge

Opinion by: The Hon. Joyce Hens Green

This matter came before the Court on the Joint Motion of the United States of America and the Court-Appointed Fiduciaries for Final Judgment with respect to 33 petitions filed by third parties pursuant to 18 U.S.C. 1963 (1). The 33 petitions, which are set forth on Exhibit A to the Joint Motion, have all been dismissed by the Court, leaving no matter regarding any of those petitions pending before the Court.

For the reasons set forth in the Joint Motion, the Court

has determined that there is no just reason for delay in the entry of final judgment with respect to the 33 petitions. Accordingly, the Court hereby directs that final jugdment be entered dismissing each of the claims set forth in Exhibit A to the Joint Motion, which shall be attached to and made a part of this order.

IT IS SO ORDERED.

October 29, 1993

/s/ JOYCE HENS GREEN
United States District Judge

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Exhibit A

Criminal No. 91-0655 (JHG)

09/20/93

Claims Dismissed as of September 20, 1993

** Category: Depositor

Claimant	Round	Amount	Date Filed	Action
Cox, Arthur, W.R.	1	2300.00	02/13/92	Dismissed 1/7/93
Hanson, Harold E.	1	11482.13	03/11/92	Dismissed 1/7/93
Shekarchian, S.A. Reze	1	1215027.20	03/09/92	Dismissed 4/23/93
Bolton, Gerald	1	100000.00	03/19/92	Dismissed 1/7/93
Hoque, M. Zahidul	1	1288.66	03/27/91	Dismissed 1/7/93
White, Margaret	1	75333.32	04/29/92	Dismissed 1/7/93
Seravaseiyar, Anton	1	2046.00	04/27/92	Dismissed 1/7/93
Seravaseiyar, Anton	2	2000.00	08/21/92	Dismissed 8/19/93
White, Margaret	2	75333.32	09/08/92	Dismissed 8/19/93
Shahriar, Ahmed	2	700.00	08/25/92	Dismissed 8/19/93
Siddiqui, Aqeel Ahmed	2	28500.00	06/22/92	Dismissed 8/19/93
** Subtotal**		1514009.63		

Claims Dismissed as of September 20, 1993

** Category: Tort Claims

Claimant	Round	Amount	Date Filed	Action
California Class Action	1	347000000.00	03/10/92	Dismissed 8/19/93
Scarfone, Lee and Patricia	1	5000000.00	03/16/92	Dismissed 2/23/93
Panama (Republic of)	1	23124193.00	03/13/92	Dismissed 8/19/93
Sturge, Nicholas Collwyn	1	9000000.00	03/26/92	Dismissed 5/18/93
Central Reserve Bank of Peru	1	3000000.00	04/27/92	Dismissed 2/22/93
Scarfone, Lee and Patricia	2	5000000.00	09/01/92	Dismissed 2/23/93
Central Bank of Peru	2	3000000.00	09/02/92	Dismissed 2/22/93
California Class Action	2	104000000.00	09/10/92	Dismissed 8/19/93
Subtotal	2	499124193.00		

Claims Dismissed as of September 20, 1993

Claimant	Round	Amount	Date Filed	Action
** Category: Separate Entity				
Central Bank of Paraguay	1	639404.78	03/19/92	Dismissed 8/19/93
Panamanian Liquidator	1	8547687.42	03/19/92	Dismissed 8/19/93
Japanese Liquidator	1	85219226.14	03/20/92	Dismissed 5/1/92
French Liquidator	1	857082.72	03/19/92	Dismissed 8/19/93
Macao Liquidator	1	1656874.34	04/14/92	Dismissed 8/19/93
Sierra Leone Conservator	1	2056883.83	04/28/92	Dismissed 8/19/93
Sudanese Liquidator	1	70251.94	04/11/92	Dismissed 8/19/93
Turkish Liquidator	1	2148337.29	06/11/92	Dismissed 8/19/93
Subtotal		101826748.46		

Claims Dismissed as of September 20, 1993

** Category: Tort Claims

Claimant	Round	Amount	Date Filed	Action
Industrial Bank of Japan	1	32000000.00	03/17/92	Dismissed 8/19/93
Bank of New York	1	6603104.00	03/06/92	Dismissed 8/19/93
Shaw, Pittman, Potts & Towbridge	1	296484.34	04/01/92	Dismissed 8/19/93
Credit Suisse	1	25565518.37	04/23/92	Dismissed 8/19/93
Industrial Bank of Japan	1	32000000.00	09/09/92	Dismissed 8/19/93
Shaw, Pittman, Potts & Towbridge	1	296484.34	09/10/92	Dismissed 8/19/93
Subtotal		101826748.46		
Total		699226542.14		

Supreme Court, U.S.
FILED
OCT 5 1995
CLERK

No. 95-360

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LIQUIDATION COMMISSION FOR BCCI (OVERSEAS) LIMITED, MACAU,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE COURT APPOINTED FIDUCIARIES OF BCCI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 5, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PARTIES TO THE PROCEEDINGS

In addition to the parties set forth in the petition for writ of certiorari, BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited, through their Court Appointed Fiduciaries, who were Defendants-Appellees in the court below, are Respondents in this proceeding.

CORPORATE LISTING PURSUANT TO RULE 29.6

Pursuant to S. Ct. Rule 29.6, the following is a list of parent corporations of the Respondents and all subsidiaries of which the Respondents were not registered owners of 100% of the shares. The list includes information as of July 5, 1991, the day on which the Respondent corporations were taken under regulatory control.

BCCI Holdings (Luxembourg), S.A.

A. Parent Corporation: None

B. Subsidiaries of which BCCI Holdings (Luxembourg), S.A. was not registered owner of 100% of the shares:

1. ItalFinance International SpA
2. BCCI (Nigeria) Limited
3. BCCI (Swaziland) Limited
4. BCC (Zimbabwe) Limited
5. BCC Cameroon S.A.
6. BCC (Emirates) U.A.E.
7. BCC (Misr) S.A.E.
8. BCC (Hong Kong) Limited
9. BCCI Finance International Limited
10. Banco de Credito e Commercio de Investmento S.A.
11. BCC S.A.E.
12. National Bank of Oman
13. BCC Ghana Limited
14. BCC S.A. (Argentina)
15. PT BCC Pratama Leasing Indonesia
16. BCCI Leasing (Malaysia) Sdn. Bhd.

17. Kuwait International Finance Company S.A.K.

18. Banco de Commerce et de Placements S.A.

Bank of Credit and Commerce International, S.A.

A. Parent Corporation: BCCI Holdings (Luxembourg), S.A.

B. Subsidiaries of which Bank of Credit and Commerce International S.A. was not registered owner of 100% of the shares: None

Bank of Credit and Commerce International (Overseas) Limited

A. Parent Corporation: BCCI Holdings (Luxembourg), S.A.

B. Subsidiaries of which Bank of Credit and Commerce International (Overseas) Limited was not registered owner of 100% of the shares: None

International Credit and Investment Company (Overseas) Limited

A. Parent Corporation: ICIC Holdings Limited

B. Subsidiaries of which International Credit and Investment Company (Overseas) Limited was not registered owner of 100% of the shares: None

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-360

LIQUIDATION COMMISSION FOR BCCI (OVERSEAS) LIMITED, MACAU,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE COURT APPOINTED FIDUCIARIES OF BCCI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Court Appointed Fiduciaries of BCCI Holdings (Luxembourg), S.A. ("BCCI Holdings"), Bank of Credit and Commerce International, S.A. ("BCCI SA"), Bank of Credit and Commerce International (Overseas) Limited ("BCCI Overseas"), and International Credit and Investment Company (Overseas) Limited ("ICIC Overseas") oppose Petitioner's request for a writ of certiorari. Petitioner's argument that this Court should resolve a perceived conflict between the New York Court of Appeals and the federal courts does not withstand analysis. There is no conflict between these courts, and even if there were conflict, certiorari would not be warranted. Petitioner's substantive arguments asserting error below are similarly without basis and do not in any event justify granting the petition in this case.

Petitioner, the Liquidation Commission for BCCI (Overseas) Limited, Macau, is a local liquidator appointed by officials in Macau to represent the unincorporated branch of BCCI Overseas in Macau. Petitioner claims ownership and seeks the release under 18 U.S.C. § 1963(*l*) of certain funds formerly held by BCCI Overseas in United States banks in accounts maintained by the corporation containing the designation "Macau." As described more fully below, those funds were forfeited under a Plea Agreement along with all other BCCI Overseas assets located in the United States.

BCCI Overseas was taken under regulatory control on July 5, 1991, along with the other corporate defendants. The Grand Court of the Cayman Islands, where BCCI Overseas is incorporated, subsequently placed the corporation under the control of the Court Appointed Fiduciaries. The Court Appointed Fiduciaries have sole authority to act with respect to corporate assets of BCCI Overseas worldwide. Locally appointed representatives of unincorporated branches lack standing to challenge forfeiture of corporate assets outside their jurisdictions. Moreover, the assets in question, under the legal standards which appellants have conceded apply to this case, belong to BCCI Overseas.

STATEMENT OF THE CASE

Because the unique facts and procedural history of this case confirm the correctness of the rulings of the courts below, the Court Appointed Fiduciaries expand upon the recitation set forth by the Court of Appeals.

A. The Liquidation Of BCCI

From 1972 to July 1991, the BCCI Group was a worldwide banking organization, operating in sixty-nine countries. The parent company, BCCI Holdings, is a Luxembourg holding company which owned two principal

operating subsidiaries, BCCI SA and BCCI Overseas.[1] BCCI Overseas, which is incorporated in the Cayman Islands, had unincorporated branches in twenty-eight countries, including Macau. BCCI Holdings also owned a large number of separately incorporated subsidiaries which operated in numerous countries. Although Petitioner misleadingly refers to the Macau branch as a separate, foreign "bank," it was not separately incorporated. As in many countries, the branch in Macau was subject to local regulation.

On July 5, 1991, bank regulators in Luxembourg, the Cayman Islands, the United Kingdom, the United States and elsewhere shut down the worldwide operations of the BCCI Group. Shortly thereafter, courts in Luxembourg and the Cayman Islands, where Respondents were incorporated, and in the United Kingdom, where BCCI SA had its major banking operations, appointed fiduciaries to oversee the global liquidations of BCCI. Since their appointments, the Court Appointed Fiduciaries have been working together to realize and consolidate all of the assets of the BCCI Group worldwide, in order to distribute those assets ratably to innocent creditors and depositors of BCCI around the world.

Directly following the coordinated seizure of BCCI in Luxembourg and the Cayman Islands, local banking regulators in various countries in which the BCCI Group had branches seized local operations, and, in some cases, appointed local liquidators to administer assets under local law. At the outset of the liquidation, the Court Appointed Fiduciaries attempted to obtain the participation of unincorporated branches in the global pooling of assets for distribution to creditors, including the creditors of BCCI Overseas.

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[1] Respondent ICIC Overseas was a related corporation, whose affairs were controlled by Agha Hasan Abedi and Swaleh Naqvi, former corrupt senior management of BCCI.

Universality of liquidation of corporations is the law in the Cayman Islands, Luxembourg, and the United Kingdom, and is necessary to achieve an equitable distribution of assets to victims. As stated by the Vice-Chancellor of the High Court of Justice in England:

> The attempt to put a ring fence around either the assets or the creditors to be found in any one jurisdiction is, at least under English law as I understand it, not correct, and destined to failure. I believe the position will prove to be the same in most other countries and jurisdictions . . . . It will require the most difficult and complicated attempts at cooperation between the different national jurisdictions which I hope will be forthcoming.

Appendix to the Court Appointed Fiduciaries' Brief in Opposition to Petition for Writ of Certiorari (hereinafter "Opp. App.") at 7a.

B. "Ring-Fencing" Of Unincorporated Branches

In contrast to the principle of universality, "ring-fencing" is the practice of treating a branch of a corporation as though it were a entity separate from the corporation itself. Where a branch of an international banking corporation is liquidated in a country applying ring-fencing, the assets of the branch are applied exclusively to pay off creditors of that branch in priority to all creditors of other branches. According to the petition, the law of Macau requires ring-fencing, and, as a local liquidator, Petitioner seeks to apply ring-fencing to benefit the creditors of the Macau branch at the expense of the global pool.

In general, when any business enterprise ceases to function, certain divisions of the business when viewed in isolation will have more access to cash and liquid assets than others. Because of the widespread financial irregularities in BCCI, the distribution of assets at the time of closure was, to some extent, independent of the recorded assets and liabilities on the books of the branches. Not surprisingly, neither the Petitioner, nor any of the other branch

liquidators, have challenged the Court Appointed Fiduciaries' assumption of financial responsibility for the BCCI entities' crimes, but each challenges the forfeiture of accounts which, it is claimed, "belong" to particular unincorporated branches of BCCI Overseas.

C. Proceedings Below

In connection with a series of criminal and regulatory charges filed against BCCI in the United States, the Court Appointed Fiduciaries and representatives of the Department of Justice, the District Attorney of New York, the Federal Reserve and numerous other state and federal agencies negotiated a comprehensive Plea Agreement, which was signed and filed in the District Court on December 19, 1991. Opp. App. at 11a-39a. The Plea Agreement was presented to and approved by courts in Luxembourg and the Cayman Islands supervising the worldwide liquidation of the BCCI entities.

The Plea Agreement required the BCCI corporations including BCCI Overseas, through the Court Appointed Fiduciaries, to plead guilty to federal and state criminal charges and to agree not to contest charges filed by the Federal Reserve. It further provided that the District Court would enter an order pursuant to 18 U.S.C. § 1963 (a) forfeiting all BCCI assets located in the United States. Under the Plea Agreement, the Attorney General agreed that half of the forfeited assets would be transferred to the Worldwide Victims and Creditors Compensation Fund administered by the Court Appointed Fiduciaries. The remaining half would be used by the Attorney General, in her discretion, for various enumerated purposes, including "restitution to victims of BCCI, which may include remission to the Court Appointed Fiduciaries . . . for the purpose of facilitating an increase in assets available for distribution by the Court Appointed Fiduciaries to innocent worldwide victims of BCCI." Opp. App. at 22a-23a.

The Plea Agreement was recognized by the courts that approved it as the best settlement that could practically be obtained for the innocent depositors and creditors. It resolved all charges, eliminating the risk that *all* of BCCI's U.S. assets would be forfeited and retained by the United States and assuring that substantial assets would be made available to worldwide victims—including the depositors who the instant Petitioner purports to represent. The U.S. assets of BCCI could then be distributed with other assets in an orderly and fair manner through global proceedings, thereby preventing piecemeal and unfair distribution of assets to individual claimants at the expense of the general body of creditors and depositors worldwide.

In accepting the Plea Agreement, the District Court concluded:

> [T]he Plea Agreement now before the Court reflects on a truly global measure extraordinary efforts and amazing cooperation of a multitude of signatories representing a myriad of jurisdictions to fully settle actions against the corporate defendants, which had operated in 69 countries around the globe, and through that plea resolution, to locate and protect all realizable assets of BCCI for the ultimate benefit of the depositors, creditors, United States financial institutions, and other victims of BCCI. The promise of the Plea Agreement is that those extraordinary efforts, that amazing cooperation, shall continue.
>
> . . . .
>
> Through the world-wide victims fund to be created pursuant to the agreement, innocent victims of BCCI's wrongdoing can recover at least a portion of lost assets in as fair a manner as possible—equitable, orderly, and expeditious. Because the fund will be administered on a global scale through unified proceedings, piecemeal and unfair distribution can be avoided.

Opp. App. at 43a-44a.

1. *The District Court Decision*

In rejecting Petitioner's claim, the District Court (Judge Joyce Hens Green) held that the Petitioner along with numerous other branch liquidators failed to satisfy the requirements of 18 U.S.C. § 1963(*l*)(2), which permits "[a]ny person, *other than the defendant*" to file a claim seeking return of forfeited property. Appendix to Petition for Writ of Certiorari (hereinafter "Pet. App.") at 8e (emphasis added). The District Court held that, "[b]ecause unincorporated divisions and their parents cannot be considered separate entities for the purpose of indictment, it would be anomalous to consider them separate entities for the purpose of determining standing to file a petition pursuant to § 1963(*l*)." Pet. App. at 14e.

2. *The Court of Appeals Decision*

A unanimous panel of the Court of Appeals for the District of Columbia Circuit affirmed the order of the District Court. The Court of Appeals rejected Petitioner's argument that the standing of the branch should be determined by application of the law of place in which the branch was located. The Court noted that this analysis could result in branches receiving differing treatment depending on where they were located. The Court rejected this notion, stating, "identically situated parties should not arbitrarily receive different treatment under the same federal statutory scheme." Pet. App. at 8d-9d.

REASONS FOR DENYING THE WRIT

Petitioner argues that this Court should resolve a perceived conflict between the New York Court of Appeals and the federal courts; this argument does not support the grant of certiorari. As recognized by both the Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia, the conflict of authority is illusory. Moreover, even if there were a conflict, the grant of certiorari would not be warranted.

Petitioner's argument that an unincorporated branch should be treated as a separate juridical entity and should therefore not be subject to criminal penalties imposed on the corporation as a whole is manifestly incorrect. Petitioner's contention that separate bodies of foreign law should be applied to petitions brought by unincorporated branches located in foreign countries would lead to inconsistent and anomalous results, impairing the United States' principled and uniform enforcement of criminal forfeiture law. Moreover, Petitioner's attempt to reach outside its ring-fence to obtain assets for the benefit of certain branch depositors at the expense of depositors worldwide is in conflict with national policy. The courts below were correct in declining to accord comity to Petitioner's appointment and instead properly according comity to the appointment of the Court Appointed Fiduciaries.

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE FEDERAL CIRCUITS AND THE COURT OF APPEALS OF NEW YORK CONCERNING THE NARROW ISSUE PRESENTED BY THIS CASE.

The issue presented in this case is whether a branch of a bank is separate from the corporation as a whole for the purpose of applying a federal criminal forfeiture statute. Under both New York law and federal common law, a branch is considered part of the corporate whole for this purpose. Accordingly, there is no conflict between the New York Court of Appeals and federal courts on this issue.

Under federal common law, when the focus of analysis is the relation of the parent bank to its individual branches, multi-branch international banks are regarded as single entities. Such treatment of bank branches accords with the generally accepted principle in federal law that divisions of corporations, unless separately incorporated, are not legally distinct from the corporate entity as a whole.

E.g., In re Sugar Indust. Antitrust Litig., 579 F.2d 13, 18 (3d Cir. 1978) ("A division of a corporation is not a separate entity but is the corporation itself."); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982) (same applied in RICO prosecution), *cert. denied*, 459 U.S. 1105 (1983); *Western Beef, Inc. v. Compton Inv. Co.*, 611 F.2d 587, 591 (5th Cir. 1980) (same); *Salzstein v. Bekins Van Lines, Inc.*, 747 F. Supp. 1281, 1282 n.1 (N.D. Ill. 1990) (division of corporation not capable of being sued separate from the corporation itself).

When international banks operate through branches rather than through separate corporate subsidiaries, the head office has ultimate responsibility and liability for the affairs of branches. *See, e.g.*, 1A A.D. Kowalsky, et al., *Michie on Banks and Banking*, Ch. 2, § 29 at 539 (repl. vol. 1993). This is particularly true if branches have closed. *See, e.g., Trinh v. Citibank, N.A.*, 850 F.2d 1164, 1168 (6th Cir. 1988), *cert. denied*, 496 U.S. 912 (1990); *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1303-04 (1st Cir. 1988); *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 863 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982).

The seminal case, which is relied on by federal courts that have addressed this issue, is the ruling of the New York Supreme Court (affirmed by the New York Court of Appeals) in *Sokoloff v. National City Bank*, 224 N.Y.S. 102 (Sup. Ct. 1927), *aff'd*, 227 N.Y.S. 907 (1928), and *aff'd*, 164 N.E. 745 (N.Y. 1928). As stated in *Sokoloff*:

> [W]hen considered with relation to the parent bank, [foreign branches] are not independent agencies; they are, what their name imports, merely branches and are subject to the supervision and control of the parent bank, and are instrumentalities whereby the parent bank carries on its business, and are established for its own particular purposes, and their business conduct and policies are controlled by the par-

> ent bank and their property and assets belong to the parent bank, although nominally held in the names of the particular branches.

224 N.Y.S. at 114.

The *Sokoloff* opinion also rejected the argument, which the Petitioner makes here, that because it is subject to local regulatory requirements, a foreign branch may become a separate entity for purpose of analyzing its relationship to the principal corporation:

> The fact that, for the privilege of doing business in Russia, the defendant was required to take out a charter for its Petrograd branch and submit to certain regulation as to the method of conducting its business, did not alter the relation of the Petrograd branch with the defendant.

Id. This reasoning has also been embraced by the federal courts. *See, e.g.,, First Nat'l Bank v. Banco Nacional de Cuba,* 658 F.2d 895, 900 (2d Cir. 1981), *cert. denied,* 459 U.S. 1091 (1982).

The cases cited by Petitioner are inapposite. They do not address the relationship between the branch and the corporation, but rather address the interaction of branches with other branches. Pet. App. at 6d-7d and n.6. Consequently, there is no conflict between federal and New York state law on this issue.

Moreover, even if there were a conflict between state and federal law, this Court need not resolve it. There is no reason that the federal law should be required to conform to state law in interpretation of a *federal* statutory scheme. As a matter of federal policy, banks are treated as integrated corporations; branches are not treated as separate entities.

The federal statute that applies to U.S. banks with foreign branches reflects a consistent federal policy that a bank and its unincorporated branches, wherever they may be located, are a single entity. Federal Foreign Banking

Law, 12 U.S.C. §§ 601-04, 611-32. Foreign branches may maintain separate books of account pursuant to 12 U.S.C. § 604, but this is "nothing more than a 'bookkeeping' statute." *First Nat'l City Bank v. Internal Revenue Service,* 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied,* 361 U.S. 948 (1960). "[F]ederal agencies and officials have long viewed a national bank and its branches as a single entity." *First Nat'l Bank v. Banco Nacional de Cuba,* 658 F.2d 895, 900 (2d Cir. 1981), *cert. denied,* 459 U.S. 1091 (1982). Similarly, this Court noted in *United States v. First Nat'l City Bank,* 379 U.S. 378, 384 (1965), that a national bank "has actual, practical control over its [foreign] branches; it is organized under a federal statute, 12 U.S.C. § 24, which authorizes it 'To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons'—as one entity, not branch by branch." (citations omitted).

II. THE DECISION BELOW WAS CORRECT.

The Macau branch of BCCI Overseas is part of a single juridical entity—BCCI Overseas. Whether this Court applies the law of Macau, the law of the United States or the law of the Cayman Islands, it is undisputed that the Macau branch was not separately incorporated. Rather, the Petitioner contends that, because BCCI Overseas had to meet certain regulatory requirements in the establishment and management of its branch in Macau, the Macau branch should be treated as a separate juridical entity and be granted standing to assert its rights to certain bank accounts. Petitioner asserts that Macanese law should be applied to determine if the Macau branch is a separate entity. But such a result would make the construction of U.S. criminal statutes subject to the vagaries of multiple and conflicting foreign laws. This would be untenable.

A. The United States Has The Greatest Interest In Applying Its Own Law.

At issue on this petition is whether, under federal criminal forfeiture law, a single corporation is to be treated as a unitary entity or as a multiplicity of sub-entities, each having its criminal liability and the forfeitability of its assets analyzed separately. The Court of Appeals decided correctly that the "greatest interest" here belongs to the United States in the enforcement of its criminal laws, not in the vindication of Macau banking law in ring-fencing assets.

It is not a close question which jurisdiction has the "greatest interest" in this litigation. The United States has "uniquely federal interests" in the application of the RICO forfeiture statute and the interpretation of the word "defendant" in that statute, and this Court should accordingly apply federal common law to the issues raised here. *See, e.g., Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988) (federal common law applies to areas of "uniquely federal interests").

Courts have typically held that determination of criminal matters is based only on the law of the country where the crime is committed. *See, e.g., United States v. Goldberg*, 830 F.2d 459, 462 (3d Cir. 1987). For United States courts to apply foreign law—indeed, multiple and potentially conflicting foreign laws—to the construction of a federal criminal statute would lead to inconsistent and uncertain results in the enforcement of the criminal statute at issue, RICO, 18 U.S.C. § 1961, *et seq.* *Cf. Taylor v. United States*, 495 U.S. 575, 591-92 (1990) (interpretation of term "burglary" in federal criminal statute should not be based on varying state laws; such interpretation would lead to "odd results"). In this case, petitions were filed in the court below by thirteen separate branches of BCCI Overseas.[2] If this Court were to look

[2] Claims were also filed by one branch of BCCI SA and by five subsidiaries of BCCI Holdings. Separately incorporated subsidiaries have been differently treated.

to the law of the country in which each branch is located, different results could occur in the petition of the Panama branch liquidator, for example, as opposed to the petition of the Gabon branch liquidator, as opposed to the petition of the French branch liquidators.[3]

If as Petitioner urges, a corporation were to fracture into numerous sub-entities each of which was to have its conduct analyzed under a separate legal system, U.S. law enforcement would inevitably be impeded. In the case of BCCI, operating in sixty-nine countries, such a haphazard regime would lead to chaos. The uncertainty of result would be an anathema to the uniform and predictable enforcement of U.S. criminal statutes, and other federal statutory schemes involving international corporate defendants could be similarly implicated, including antitrust and securities laws. The interest of the United States in applying its own law is manifest.

B. Petitioner Could Adduce No Facts That Would Permit The Court To Find That It Is An Independent Corporate Entity And A Hearing Was Properly Denied.

Petitioner asserts that it was improperly denied an opportunity in the District Court to show that under Macanese law, the Macau branch should be treated as a separate juridical entity from BCCI Overseas. However, as correctly determined by the courts below, the factual issues the Petitioner sought to raise below, such as separate "capitalization," maintenance of separate books, and conformance with Macanese regulations, are irrelevant to the ultimate determination that the branches are part of a single corporate defendant.[4] *See Sokoloff v. National*

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[3] Moreover, certain claimants who were not branch liquidators also asserted claims to the same accounts. It would be even more incongruous to apply the law of different jurisdictions to differing petitioners who assert rights to the same assets.

[4] Petitioner refers, somewhat misleadingly, to separate "capitalization." As Petitioner conceded at oral argument, the Macau

City Bank, 224 N.Y.S. 102, 114 (Sup. Ct. 1927), *aff'd*, 227 N.Y.S. 907 (1928), and *aff'd*, 164 N.E. 745 (N.Y. 1928); *First Nat'l Bank*, 658 F.2d 895, 900 (2d Cir. 1981), *cert. denied*, 459 U.S. 1091 (1982).

Because Petitioner could present no set of facts that would entitle it to recover, the District Court properly dismissed Petitioner's claims without a hearing under 18 U.S.C. § 1963(*l*) and the Court of Appeals properly affirmed the District Court's order.

III. INTERNATIONAL COMITY SUPPORTS RECOGNITION OF THE COURT APPOINTED FIDUCIARIES AS CORPORATE REPRESENTATIVES, NOT THE PETITIONER.

The Petitioner claims that the courts below erred in not extending comity to the branch liquidation in Macau. But the question presented is not whether U.S. courts should accord comity, but rather *which* proceedings deserve comity: the global liquidation proceedings or the ring-fenced branch liquidations conducted to give preferential treatment to branch depositors over worldwide creditors. The Court Appointed Fiduciaries submit that comity requires deference to the global proceedings, which comport with U.S. policy.

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branch has no shareholders and issued no stock. Consequently, it is not capitalized in the sense that this term is used in corporate law. Instead, it maintained reserves or capital equivalency deposits, consistent with local regulatory requirements, that supported the liquidity of the branch. In addition, while the Macau branch may have maintained an individual branch balance sheet for convenience, its assets and liabilities were reported to and consolidated into the balance sheets and books of BCCI Overseas as a corporate entity. Compliance with local regulatory requirements does not make a branch a separate corporation, any more than a domestic corporation's compliance with a state's sales and property tax requirements would make its division in that state a separate corporation.

This Court has defined comity as:

> the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 164 (1895). In applying comity to foreign judgments, courts, including those cited by the Petitioner, make clear that "the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984); *see also DeYoung v. Beddome*, 707 F.Supp. 132, 135 (S.D.N.Y. 1989). The laws and public policy of the United States do not support a branch liquidator's goal to collect assets outside its ring-fenced jurisdiction for distribution on a preferential basis to the limited group of BCCI creditors who happen to be depositors of that branch. To the contrary, the laws and public policy of the United States support equal distribution of assets to *all* the creditors and depositors of a bank in dissolution, regardless of branch affiliation.

Since its enactment more than a century ago, for example, the National Bank Act ("NBA") has required equitable distribution of the assets of banks in dissolution. 12 U.S.C. §§ 91 & 194. In *Davis v. Elmira Sav. Bank*, 161 U.S. 275 (1896), a savings bank sought the preferential return of funds in an account in a national bank in dissolution under a New York statute entitled "Debts Due Savings Banks from Insolvent Banks Preferred." *Id.* at 277. In addition to finding that the NBA preempted state law, this Court stated:

> [T]here is an absolute repugnancy between their provisions; that is, between the ratable distribution, commanded by congress, and the preferential distri-

> bution directed by the law of the state of New York. The conflict between the spirit and purpose of the two statutes is as pronounced as that which exists between their unambiguous letter. It cannot be doubted that one of the objects of the national bank system was to secure, in the event of insolvency, a just and equal distribution of the assets of national banks among all unsecured creditors . . . .

Id. at 284; *see also United States ex rel. White v. Knox*, 111 U.S. 784, 786 (1884); *Downriver Community Federal Credit Union v. Penn Square Bank*, 879 F.2d 754, 759 (10th Cir. 1989) (NBA provisions for dissolution established a 'federal mandate of equality.') (citation omitted), *cert. denied*, 493 U.S. 1070 (1990); *Poole v. Elliott*, 76 F.2d 772, 774 (4th Cir. 1935) (All depositors from all branches, whether operated with or without legal authority, must be treated equally.). While the National Bank Act is not technically applicable to the liquidation of the BCCI Group, which was not a federally-chartered bank, the NBA and cases interpreting the NBA remain a strong statement of U.S. federal policy in favor of ratable distribution, which should apply with no less force in the context of an international liquidation.

The need for comity in favor of a single centralized proceeding in the country of incorporation is particularly strong in the context of international insolvency.

> The granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion. Consequently, American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities.

Cunard S.S. Co. v. Salen Reefer Services AB, 773 F.2d 452, 458 (2d Cir. 1985). Comity toward foreign proceedings should be granted unless "contrary or prejudicial

to the interest of the nation called upon to give it effect." *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972) (footnote omitted). Extension of comity in this case requires giving effect to the Plea Agreement, which was negotiated by the Court Appointed Fiduciaries and approved by the appointing courts in Luxembourg and the Cayman Islands.

In addition, the extension of comity to the liquidation proceedings in Luxembourg and Cayman Islands is appropriate because these countries have paramount interest in the liquidation of their domestic corporations. Only the global proceedings conducted by the Court Appointed Fiduciaries will assure "equitable, orderly, and systematic" distribution of assets. By contrast, turning over assets located in the United States to ring-fenced liquidations elsewhere would allow groups of creditors of particular branches, generally those that already have an advantage over the global body of similarly situated creditors, to obtain an even greater advantage over those worldwide creditors. Extension of comity to those proceedings would assure "haphazard, erratic or piecemeal" distribution. Such a result would be contrary to the principles of distribution set forth in the Bankruptcy Code, *see, e.g., In re Saybrook Mfg. Co.*, 963 F.2d 1490, 1496 (11th Cir. 1992), as well as national policy governing bank insolvencies expressed in the NBA.

CONCLUSION

For the above-stated reasons, the Court Appointed Fiduciaries respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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Dated: October 5, 1995

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APPENDICES

APPENDIX A

No. 007615/91

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice

Tuesday, 30th July, 1991

Before:

The Vice-Chancellor
(Sir Nicolas Browne-Wilkinson)

IN THE MATTER OF:

BANK OF CREDIT AND COMMERCE INTERNATIONAL, SA

JUDGMENT
(As Approved)

THE VICE-CHANCELLOR: This is a Winding Up Petition brought by the Bank of England under section 92 of the Banking Act, 1987, to wind up the Bank of Credit and Commerce International SA which I will refer to as "BCCI". BCCI is a Company incorporated in Luxembourg. There are many other Companies in the same group. The holding Company is also incorporated in Luxembourg. Another Company, BCCI Overseas, is incorporated in the Grand Cayman Islands. The holding Company also has numerous subsidiaries incorporated in various other jurisdictions around the World.

The Petition is based on two grounds, one, that it is in the public interest to wind up BCCI, the second, that BCCI is insolvent.

The evidence in support suggests that there has been very widespread fraud, also worldwide, in the running of BCCI in the past. It also suggests that the current position is that BCCI is substantially insolvent. It has depositors in many countries all round the world: it has assets in many countries all round the world. This Winding Up Petition is a Petition to wind up BCCI as a whole, not simply the United Kingdom branch of it. A Winding Up Petition could not be brought simply to wind up the English branches of BCCI.

When the matter was before me 8 days ago, an application was made by the Ruler of Abu Dhabi and the Abu Dhabi Government as majority shareholders in BCCI for an adjournment. I stood the matter over for 8 days for three matters to be considered. The first was that provisional liquidators appointed by this Court and a Commissaire appointed by the Courts in Luxembourg were encountering difficulties in obtaining information from Abu Dhabi. I wished to have that looked into.

The second point to be investigated was the position of the employees of BCCI in this country whose future during a prolonged adjournment would be very difficult. They would not be entitled to redundancy payments until a Winding Up Order was made, nor would the provisional liquidators necessarily be in a position to continue their employment.

The third matter to be considered was the position of sterling depositors in England. Under the Deposit Protection Scheme established by the Banking Act 1987, on the making of a Winding Up Order depositors would be entitled to receive payment of up to 75% of their loss to a maximum of £15,000. The effect of a prolonged adjournment of a Winding Up Petition would be that those

depositors would not be entitled to receive their compensation under the scheme. Those three matters seemed to me matters directly relevant to the question whether or not to grant the adjournment sought by the majority shareholders with a view to investigating the position and possibly putting forward a scheme for a partial or total rescue of BCCI could be worked out.

The matter now comes back before me and proposals have been put forward to deal with all three of those matters.

As to the first, namely, the availability of information to the Commissaire appointed by the Luxembourg Court and to the provisional liquidators, I am happy to say that that has been dealt with to the satisfaction of the provisional liquidators and the Commissaire.

As to the employees, a scheme has been worked out between the majority shareholders and the provisional liquidators along the following lines. On 31st of this month the majority shareholders will pay £1.2m to the provisional liquidators, being a sum estimated to provide sufficient to pay 14 days salaries and expenses for English employees.

Secondarily, every 7 days thereafter, it is the intention of the majority shareholders—though there is no binding obligation as I understand it—to pay such further sums to the provisional liquidators as are calculated to provide enough to cover salaries and expenses for a further 7 days. The provisional liquidators are to hold those monies paid to them on trust to pay salaries and expenses of the staff. In the event that the majority shareholders do not make any payment at the commencement of the 7 day period the provisional liquidator will apply to the Court, or dismiss some or all of the employees. However, the provisional liquidators will not dismiss any employee without giving 7 days notice of their intention so to do to the majority shareholders.

In the meantime, the majority shareholders and the provisional liquidators are to continue discussions concerning the formulation and implementation of a possible redundancy scheme. It his hoped, though no more, that such redundancy scheme will produce a sum equal to the statutory redundancy payments which would be obtained by employees dismissed in the event of winding up.

It is to be emphasised, as was emphasised to me in argument, that employees of BCCI in this country must appreciate that nothing that is being put forward at this stage provides them with any guarantee of the continuation of their jobs.

The third element relates to the position of those who have deposited money in England in Sterling. A scheme has been worked out in principle (though the detailed drafting of it remains to be completed) under which a Fund will be established. The majority shareholders have already remitted to this Country the sum of £50m of which £43m will be allocated to the Fund. The Fund is to be vested in the Law Debenture Trust Corporation PLC, and is to be administered by the provisional liquidators, or possibly only one of them, Mr. Morris. The Fund will be held on trust to make payments to UK Sterling Depositors on the same terms as they would be entitled under the Deposit Protection Scheme had a Winding Up order been made, but subject to the following alterations. Instead of a maximum payment of £15,000 under the Statutory Scheme, the maximum payment will be £5,000; payments out of the Fund will be by way of loan only. However, the majority shareholders and the Fund will not be entitled (subject to one exception) to recover from the receipients monies advanced by way of loan out of the Fund, save by recovery from the Deposit Protection Scheme (if a Winding Up Order is eventually made) or from BCCI (if negotiations for a rescue scheme prove successful). The majority shareholders will be ob-

taining from each depositor who receives an advance out of the Fund irrevocable mandates directed to the Deposit Protection Scheme and to BCCI, directing repayment either from the Scheme, or from the Fund. The sole exception proposed to the inability of the majority shareholders to recover the debt directly from the depositor is this: if a depositor has received an interim payment out of the Fund and seeks to revoke his irrevocable mandate, the majority shareholders would be entitled to recover the advance from the depositor direct.

Those proposals fall short of putting the United Kingdom Sterling depositors in exactly the same position as they would be if a Winding Up Order were made today. In particular, the limit of £5,000 as the maximum payment out of the Fund is plainly less beneficial than the maximum of £15,000 under the Statutory Scheme.

However, when I suggested this Scheme at the first hearing, my concern was directed, not so much to the putting in place the whole Statutory Scheme, but to ensuring that there would not be, so far as possible, suffering by the small depositor all of whose money had gone as a result of the unhappy position that has now arisen in relation to BCCI. The Scheme now proposed seems to me to achieve that result. Out of the 48,400 UK sterling depositors, 39,400 had deposits with BCCI of £2,000 or less. Those depositors will be better off under this proposal than under an immediate Winding Up Order, since they will receive exactly the same amount as they would under the Statutory Scheme, and in addition they have the chance—no more than the chance—of recovering the remaining 25% of their deposit which, if a Winding Up Order were to be made today, would look very dubious indeed. In addition to them, all those depositors with not more than £6,666-odd on deposit will also be in the same position as those to whom I have just referred. It is only those who have deposits in excess of the £6,666-odd who will be worse off under the

proposal than they would be if an immediate Winding Up Order were to be made.

In my judgment those proposals are adequate to cover short term suffering and are indeed, generous, since the money is put forward by the Government of Abu Dhabi in circumstances where they are under no legal obligation so to do in order to alleviate immediate suffering.

It was, therefore, rather to my surprise that I found the Bank of England opposing the application now made by the majority shareholders to adjourn this Hearing until 2nd December, to enable first the whole complicated situation within BCCI and its associates to be investigated and, secondly, having done that to see whether there can be put forward proposals for a partial or total restructuring and refinancing of BCCI.

The provisional liquidators, and in particular the Commissaire appointed by the Luxembourg Court, are in discussion with the majority shareholders. The provisional liquidators support the adjournment and consider a period of 4 months as an appropriate and necessary period in order for the research to take place.

The grounds of opposition by the Bank are stated in an Affidavit that has been sworn. The first ground is that the small depositors who would be entitled to 75% of their deposits up to £15,000 under the Statutory Scheme should get that full amount under the interim proposal being put forward by the majority shareholders. The Bank has not proved willing itself to contribute any cash towards that objective.

Secondly, it is said that BCCI is insolvent. That has not been proved though I am very far from saying it is untrue. But the very purpose of this adjournment is to lead to a position where the Court does not at this stage investigate the truth or falsity of the allegations made. The Bank feels that it is its responsibility to look after the position of the small depositors. It is said that the provision of less than the full maximum £15,000 casts doubts

over the willingness of the majority shareholders to make funds available for a rescue. It is said that the Bank is concerned, in a case where the most serious allegations of widespread fraud are made against the conduct of BCCI, that the Winding Up should proceed and that the necessary investigations should take place. Finally, it is said that there are no firm proposals put forward by the majority shareholders as to the terms on which any rescue could be affected.

Two small depositors also oppose the adjournment. It is not clear to me that they themselves are actually prejudiced by it, since I understood them to be depositors of under £2,000. But their position is the same as that put forward by The Bank of England, namely, they think they would do better, like other small depositors, if there were an immediate Winding Up.

I have no hesitation in rejecting The Bank of England's grounds for opposing an adjournment. This case raises, and will continue to raise, enormous problems. BCCI is a Luxembourg Bank; it is not an English Bank. As I understand it, if a Winding Up goes forward the assets of BCCI worldwide will be applicable for the creditors of BCCI worldwide. The attempt to put a ring fence around either the assets or the creditors to be found in any one jurisdiction is, at least under English Law as I understand it, not correct, and destined to failure. I believe the position will prove to be the same in most other countries and jurisdictions. It is a matter of profound regret to me that there is no International Convention regulating international insolvency. This case, I hope, if it does nothing else may concentrate people's minds on the necessity for such a Convention. What we do have are some rather dated rules of Private International Law which will regulate the disposal of the assets in the event that no rescue scheme is possible. It will require the most difficult and complicated attempts at co-operation between the different national jurisdictions which I hope will be forthcoming. I am told that such co-operation is already

forthcoming from at least 3 other jurisdictions including Abu Dhabi itself with a view to co-ordinating what is an overwhelmingly difficult problem given the absence of any international structure to deal with it. But, whether the matter is dealt with by way of Winding Up or whether it is dealt with by schemes or arrangement, my present understanding is that all assets worldwide will have to be taken into account, as will all creditors. It is for that reason primarily that I am quite unable to accept The Bank of England's grounds for objecting to an adjournment in this case.

One aspect of their objection concentrates on the position of those creditors who are Sterling creditors of branches in this country who will, to the extent that I have tried to indicate, be worse off than if an immediate Winding Up Order were to be made. They number, at the most, some 9,000 creditors. The evidence before me states there are 1.25 million depositors of BCCI worldwide. It is the interests of the depositors as a whole which I believe this Court ought to consider. Though it can, and should, take into account particular classes of creditors, no class such as the Sterling depositor in this country can have the right to stand in the way of what otherwise might be in the interests of the creditors of BCCI as a whole. I am bound to say that this aspect of the case put forward by The Bank of England seems to be putting undue stress on the interest of English Sterling creditors at the expense of other creditors. The truth of the matter, as far as I can see, is that if any substantial recovery is to be made by the creditors of BCCI as a whole, worldwide, the best and possibly the only hope is the restructuring proposals which may be put forward by the Government of Abu Dhabi in the long run. To stand in the way of that possibility is not to serve the interests of the depositors of this Company viewed as a whole but to approach the matter on an insular basis.

I entirely accept the point made by The Bank that if the allegations made are true, BCCI has been conducted

in a way which is scandalously fraudulent and it would be in the public interest to put an end to it. Weighing that, and taking it into account, I am influenced by the fact that no question of further fraudulent dealing by the bank in this Country can occur in the interim. There are provisional liquidators in charge of the operation. The risk of perpetuation of that fraud in day to day dealings in the future is non-existent. Accordingly, though I can well understand the desire of the Bank of England to demonstrate that banks conducted in the way they allege BCCI has been conducted cannot survive, I do not believe that it is essential in the immediate interests either of the public or of the depositors that that should be demonstrated at this stage.

Finally, the ground that there is no concrete proposal put forward seems to me to carry no weight at all. Mr. Moss, for The Bank of England, accepted when it was put to him that the intervention of the world regulatory authorities on 5th July of this year completely altered the restructuring proposals that had been under discussion. In addition there are major, and possibly impossible, tasks of research to be done to try and disentangle what has happened in BCCI. The estimate of duration of such inquiries of 6 months does not seem to me to be in any way inordinate. It is necessary, as it seems to me, to provide sufficient time for that to be done.

I have considered the Bank's alternative proposals the first of which suggested there should be an adjournment only until October. However, I reject that because on the material before me (which includes the estimate made by the provisional liquidators and the Commissaire himself) that would be an inadequate period for useful progress to be made. Secondly, The Bank suggested that I should make a Winding Up Order, but suspend its operation pending the inquiries and possible negotiations taking place. That I have no hesitation in rejecting. I do not know, and cannot have any insight into, the reasons which are leading the majority shareholders to consider

a restructuring. They have said, and I am bound to accept it, that if a Winding Up Order is made they will have no further interest in seeking to rescue BCCI in any way. Since I do not know what their basic motivation is, I am quite unable to make an assessment as to whether they do or do not understand the full implications of a Winding Up Order with a Stay. I must accept what they say—if a Winding Up Order is made that is the end of any rescue at all. On that footing I reject any suggestion that I can make a Winding Up Order today since that will put an end to any hope of rescue.

For those reasons I propose to grant the adjournment until 2nd December. The documentation is not yet in place. I am assured that it is likely to be within the week. If the documentation is not in place within 7 days, I direct the provisional liquidators to apply back to me for further directions. In any event, I give liberty to restore the Winding Up Petition (on 14 days Notice) to The Bank of England as the Petitioner, to the provisional liquidators, to the majority shareholders and to BCCI itself. If any other creditor or person interested wishes to have the Winding Up Petition restored, they should apply to the provisional liquidators who will take the necessary steps to bring the matter to the Court's attention when it can be dealt with and considered.

Finally, I should say this. It is anticipated that the interim scheme for depositors will not take any longer to put in place and produce cash payments than would the Statutory Scheme if I had made a Winding Up Order. It is hoped, and nobody should attach more importance than is appropriate to the word "hoped", that payments will start in August.

Right, Mr. Moss, then I will stand it out until 2nd December. Anything else I ought to deal with today?

MR MOSS: My Lord, I do not believe so.

MR JOHNSON: My Lord, costs reserved, presumably?

THE VICE-CHANCELLOR: Costs reserved.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 91-0655

UNITED STATES OF AMERICA

-v-

BCCI HOLDINGS (LUXEMBOURG), S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED, INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED,

Defendants.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
CRIMINAL TERM

Ind 8090/91

PEOPLE OF THE STATE OF NEW YORK

-v-

BCCI HOLDINGS (LUXEMBOURG), S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL S.A., BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED, INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED, *et al.*,

Defendants.

PLEA AGREEMENT

Parties and Purpose

WHEREAS, the United States of America, by its attorneys for the United States Department of Justice (the "DOJ"), the People of the State of New York, by the District Attorney for New York County, Robert M. Morgenthau (the "DANY") and Brian Smouha, Jacques Delvaux and Constant Franssens, as Commissairies of BCCI Holdings (Luxembourg) S.A. ("BCCI Holdings"); Brian Smouha, as Commissaire of Bank of Credit and Commerce International, S.A. ("BCCI SA"); Ian Wight and Robert Axford, as Joint Provisional Liquidators of Bank of Credit and Commerce International (Overseas) Ltd. ("BCCI Overseas"); and Ian Wight and Robert Axford as Joint Provisional Liquidators for International Credit and Investment Company (Overseas) Limited ("ICIC") (all such persons acting in the capacities so indicated or their duly appointed successors, being hereinafter collectively referred to herein as the "Court Appointed Fiduciaries"), have engaged in discussions with respect to the subject matter hereof pursuant to Rule 11 of the United States Federal Rules of Criminal Procedure, and, with respect to DANY, under New York law;

WHEREAS, the DOJ and the DANY have pursued investigations into the business and affairs of BCCI Holdings, BCCI SA, BCCI Overseas and ICIC (collectively, "BCCI"), which investigations have developed, for the benefit of law enforcement and regulatory agencies, significant evidence of criminal activity by the prior management of BCCI and both the DOJ and the DANY continue to pursue investigations into the impact of that activity;

WHEREAS, prior to July 5, 1991, BCCI had been a worldwide banking organization with operations in approximately 69 countries and on July 5, 1991 BCCI was closed by bank regulatory authorities in the United King-

dom, the United States, the Cayman Islands, Luxembourg and elsewhere;

WHEREAS, BCCI is presently insolvent, and is subject to insolvency or liquidation proceedings pursuant to the laws of Luxembourg and the Cayman Islands and, in the case of certain agencies and branches of BCCI SA, are awaiting liquidation or in the process of being liquidated in the States of California and New York, and elsewhere;

WHEREAS, the failure of BCCI is likely to cause thousands of innocent depositors and other creditors throughout the world to suffer losses in the aggregate in billions of dollars;

WHEREAS, in order to address the foregoing, the Court Appointed Fiduciaries have been appointed to act as joint provisional liquidators and/or commissaires by courts in the respective domiciles of the BCCI companies to collect all BCCI assets located throughout the world, and liquidate the same for the purpose of achieving the greatest possible distribution to all lawful creditors and depositors of BCCI on a worldwide basis;

WHEREAS, in furtherance of the Court Appointed Fiduciaries' efforts, the Court Appointed Fiduciaries have filed a petition in Bankruptcy Court in the Southern District of New York under Title 11, Section 304 of the Bankruptcy Code seeking the turnover of all BCCI assets in the United States to the Court Appointed Fiduciaries (the "Section 304 Proceeding") and a Temporary Restraining Order has been issued in connection therewith;

WHEREAS, former management and operators of BCCI fraudulently and secretly acquired (1) direct or indirect ownership and control over the shares of First American Bankshares Inc., Washington, D.C. ("First American"), the former National Bank of Georgia, Atlanta, Georgia, and Independence Bank, Encino, Cali-

fornia ("Independence Bank"), and (2) an interest in the former CenTrust Savings Bank, Miami, Florida ("CenTrust");

WHEREAS, the DOJ and federal banking regulators intend to minimize the risk of potential loss to the Bank Insurance Fund and United States taxpayers by obtaining a fund which could provide additional capital to depository institutions and safeguard the Bank Insurance Fund, if either are necessary, in connection with BCCI's secret investment in U.S. financial institutions;

WHEREAS, it appears that the identifiable assets of BCCI in the United States, exclusive of any stock ownership in First American and Independence Bank, constitute approximately $550,000,000 in cash and other assets;

WHEREAS, the prior management and operators of BCCI are no longer involved in any effective decision-making capacity with BCCI, and its worldwide affairs are subject to the control of the Court Appointed Fiduciaries whom the DOJ, the DANY and the other parties hereto recognize, based upon various court appointments, as having full right and authority to act on behalf of BCCI and whom the DOJ and the DANY are willing to support in their efforts to collect and appropriately liquidate and distribute the assets of BCCI in an orderly and fair manner, consistent with the protection of innocent victims of BCCI and the due administration of justice;

WHEREAS, responsible authorities in the United States, the United Kingdom, the Cayman Islands and Luxembourg desire that the assets of BCCI be distributed by the Court Appointed Fiduciaries only in a manner which (a) protects United States taxpayers from potential losses to the banking organizations illegally acquired by BCCI, (b) provides prompt recovery to innocent depositors, creditors and other victims of BCCI, and (c) ensures, as set forth herein, that no monies are paid to persons who have violated laws forbidding narcotics

trafficking, terrorism, money laundering, crimes of violence or other acts generally recognized as felonies or similar crimes under the laws of the United States and other countries subscribing to recognized norms of international justice;

WHEREAS, pleas of guilty entered by the Court Appointed Fiduciaries, on behalf of BCCI, to substantial criminal charges in the United States will address significant U.S. law enforcement interests that the parties hereto believe, once the pleas provided for herein are entered and accepted by the relevant courts and all of the provisions of this Agreement are implemented as provided herein, will resolve all criminal investigations, charges, indictments and all criminal and civil proceedings against BCCI concerning matters occurring before July 5, 1991 subject to the terms and conditions set forth herein, thereby removing a major impediment and in fact facilitating the distribution of substantial BCCI assets to innocent depositors, creditors and other victims of BCCI;

WHEREAS, in addition to the DOJ and the DANY, responsible international law enforcement and regulatory authorities in the United Kingdom, the Cayman Islands and Luxembourg also desire a resolution which balances interests in obtaining an appropriate penalty for illegal corporate conduct and compensation of innocent depositors, creditors and other victims of BCCI;

WHEREAS, the entry of pleas of guilty by the Court Appointed Fiduciaries, on behalf of BCCI, to criminal charges in the United States District Court for the District of Columbia (the "U.S. District Court") and the Supreme Court of the State of New York (the "N.Y. Supreme Court") as provided herein is not intended by the parties hereto to preclude the criminal prosecution of or any civil action against any culpable BCCI officers, employees, agents or other entities (other than BCCI) or wrongdoers;

WHEREAS, the parties believe that the entry of pleas of guilty by the Court Appointed Fiduciaries, on behalf of BCCI, to criminal charges as provided herein will materially assist in the prosecution of culpable persons and entities (other than BCCI) by permitting DOJ, DANY, and other enforcement authorities to obtain greater access to documents and witnesses through the full cooperation and assistance of the Court Appointed Fiduciaries.

NOW, THEREFORE, the United States of America through the DOJ, the DANY, the Board of Governors of the Federal Reserve System (the "Board of Governors"), the Federal Deposit Insurance Corporation ("FDIC"), the Resolution Trust Corporation (the "RTC"), the Office of Thrift Supervision (the "OTS"), the Office of the Comptroller of the Currency (the "OCC"), the Securities and Exchange Commission ("SEC") the Superintendent of Banks of the State of New York ("N.Y. Banking"), the Superintendent of Banks of the State of California ("California Banking") and the Court Appointed Fiduciaries, with the assistance and support of the Serious Fraud Office of the United Kingdom (the "Serious Fraud Office"), the Public Prosecutor for Luxembourg, and the Attorney General of the Cayman Islands hereby covenant and agree as follows:

THE PLEAS

The Federal Plea

1. The Court Appointed Fiduciaries, acting on behalf of BCCI, will cause BCCI to waive venue and plead guilty in the U.S. District Court to the information, attached hereto as Exhibit A-1 (the "U.S. Information"), which charges BCCI with conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. Sections 1962(c) and (d).

2. The Court Appointed Fiduciaries fully understand the nature and elements of the crimes with which BCCI has been charged in the U.S. Information.

3. The Court Appointed Fiduciaries will cause BCCI to plead guilty because, to the best of their knowledge, they have determined after due inquiry that acts of prior management of BCCI establish that BCCI, as the entity responsible for the acts of such management, is in fact guilty of the charges contained in the U.S. Information and, in causing BCCI to plead guilty to the U.S. Information, the Court Appointed Fiduciaries, on behalf of BCCI, will accept the factual statements set forth in the U.S. Information and the conclusion of the DOJ that these statements provide a legally sufficient factual basis for the plea contemplated in paragraph 1 above.

The New York County Plea

4. The Court Appointed Fiduciaries, acting on behalf of BCCI, will cause BCCI to plead guilty in the N.Y. Supreme Court to counts one through six of New York County Indictment Number 8090/91 ("N.Y. Indictment") (Attached hereto as Exhibit A-2), it being expressly understood that the DANY will move to withdraw, as to BCCI only, at the time of the plea of guilty the second full paragraph of page 5 of said indictment, and the Court Appointed Fiduciaries will consent to that motion.

5. The Court Appointed Fiduciaries fully understand the nature and elements of the crimes with which BCCI has been charged in the N.Y. Indictment.

6. The Court Appointed Fiduciaries will cause BCCI to plead guilty because, to the best of their knowledge, they have determined after due inquiry that acts of prior management of BCCI establish that BCCI, as the entity responsible for the acts of such management, is in fact guilty of the crimes charged in counts one through six of the N.Y. Indictment as amended pursuant to paragraph 4 and, in causing BCCI to plead guilty to those crimes,

the Court Appointed Fiduciaries, on behalf of BCCI, accept that the factual statements set forth in counts one through six of the N.Y. Indictment provide a legally sufficient factual basis for the plea contemplated in paragraph 4 above.

7. The Court Appointed Fiduciaries, on behalf of BCCI, will join with the DANY's recommendation that, a fine of $10,000,000 under the New York Penal Law section 80.15 be imposed, jointly and severally, on the corporate entities defined above as BCCI, payable as provided in paragraph 12 below.

FORFEITURE AND DISGORGEMENT

8.(a) Upon execution of this Agreement by the parties, the Court Appointed Fiduciaries will cause $5,000,000 to be paid as an interim capitalization payment to Independence Bank (the "Interim Capitalization Payment") in exchange for newly issued shares of Independence Bank, which shares shall represent all the outstanding shares of Independence Bank. The shares to be issued pursuant to the Interim Capitalization Payment shall be issued in the name of one or more of the entities constituting BCCI herein and shall be subject to the divestiture Order of the Board of Governors of May 6, 1991 and placed in a trust to manage, control and sell Independence Bank, with an independent trustee to be selected by the Court Appointed Fiduciaries, which trust and trustee will be subject to the approval of the Board of Governors, California Banking, DOJ, and DANY, and subject to paragraph 9(b).

(b) Upon the filing of the U.S. Information, pursuant to 18 U.S.C. Section 1963(d)(1), the DOJ, on behalf of the United States, shall apply to the U.S. District Court with the consent of the Court Appointed Fiduciaries for an order directing that certain BCCI assets located in the United States, more fully described in Exhibit B, be paid

into a custodial account maintained by the Treasury Department in a segregated account within the Department of Justice Seized Asset Deposit Fund in the name of the U.S. District Court (the "Custodial Account"). As proceeds from paragraphs 9(b) through (e) becomes available, the DOJ, on behalf of the United States, shall apply to the U.S. District Court with the consent of the Court Appointed Fiduciaries for appropriate orders effectuating the transfer of proceeds to the Custodial Account for disbursement. During the term of this Agreement, funds in the Custodial Account shall draw interest, which interest will accrue to the Custodial Account. Upon entry of the Forfeiture Order as provided herein, the Custodial Account will be transferred from the Seized Asset Deposit Fund to the Department of Justice Assets Forfeiture Fund. Notice of any payments and transfers relating to the Custodial Account shall be made to the parties by the Treasury Department.

9. Upon entry of a judgment of conviction on the U.S. Information and an order of forfeiture issued pursuant to 18 U.S.C. Sections 1963(a)(1), (2) and (3) (the "Forfeiture Order"), BCCI shall forfeit to the United States the following property of BCCI located in the United States:

(a) all of BCCI's ownership interest in deposits and other assets originally held in those banks and brokerage firms identified on Exhibit B hereto and then paid into the Custodial Account under paragraph 8(b),

(b) the net proceeds from the sale or other disposition or transfer of any stock, security or other interest in Independence Bank, but not the stock, security or other interest itself,

(c) the net proceeds from the sale or other disposition or transfer of any stock, security or other interest in First American, but not the stock, security or other interest itself,

(d) the balance of the liquidation estates of the Los Angeles and New York agencies of BCCI SA, but not the estates themselves, upon completion of liquidation proceedings conducted by the New York Banking and the California Banking in accordance with the laws of California and New York. For purposes of the foregoing, the "liquidation estates" shall consist of all of the rights and interests of the Superintendent of Banks of the states of New York and California under their respective state law banking statutes, with respect to the assets of BCCI SA located in their respective states and the assets of the New York and California agencies of BCCI SA. The liquidation estates do not include the assets enumerated in Exhibit B, and

(e) the entirety of BCCI's interests in all other property, not identified in clauses 9(a) through (d), located in the United States, including, without limitation, real property and all tangible and intangible personal property.

10. In furtherance of the ongoing liquidation activities of the New York Banking and the California Banking, the New York Banking and the California Banking will attempt to complete their respective liquidations as soon as practicable consistent with their respective statutes and the determinations of their respective courts. Thereafter, they will transfer to the Custodial Account the United States' forfeiture interest in the entire remainder of the liquidation estates, as quickly as reasonably possible.

11. As promptly as practicable after the entry of the Forfeiture Order and, to the extent possible, pending the completion of any proceedings that may be required under 18 U.S.C. Section 1963(*l*), disbursements shall be made from the Custodial Account to a U.S. Disgorgement, Compensation and Penalty Fund maintained by the Treasury Department within the Department of Justice Assets Forfeiture Fund (the "U.S. Fund") and, subject to para-

graphs 13, 14, and 17 below, to a Worldwide Victims and Creditors Compensation Fund maintained by the Court Appointed Fiduciaries (the "Worldwide Victims Fund") as follows:

(a) subject to clause (d) below, the first $100,000,000 deposited in the Custodial Account shall be disbursed to the U.S. Fund for the purposes set forth in paragraph 12;

(b) the next $100,000,000 deposited in the Custodial Account shall be disbursed to the Worldwide Victims Fund;

(c) subsequent deposits to the Custodial Account shall be concurrently disbursed in equal amounts to the U.S. Fund and the Worldwide Victims Fund, except that monies due to the U.S. Fund shall be paid without regard to delays, if any, under paragraph 13(a);

(d) prior to the disbursement described in clauses (a) through (c) of this paragraph 11, the Interim Capitalization Payment described in paragraph 8(a) shall be refunded to the Court Appointed Fiduciaries.

12. As determined in the sole discretion of the Attorney General of the United States (the "Attorney General"), the U.S. Fund shall be used for the following purposes:

(a) to minimize the risk of potential loss to the Bank Insurance Fund of the FDIC and United States taxpayers by providing additional capital, upon the request of the FDIC, OCC and the Board of Governors, to the subsidiary banks of First American, and Independence Bank, or to reimburse the Bank Insurance Fund for any losses it incurs in connection with the sale or disposition of these institutions; *provided, however,* that when all said institutions are sold or otherwise disposed of an amount equal to any such capital infusion or insurance fund payment

shall first be repaid to the U.S. Fund, with the balance of the net proceeds of the sale or disposition paid in equal amounts through the Custodial Account to the U.S. Fund and the Worldwide Victims Fund;

(b) within one week of the entry of the Order of Forfeiture, the Court Appointed Fiduciaries shall apply for remission, and the Attorney General will remit as soon as available $10,000,000 out of funds deposited in the U.S. Fund pursuant to paragraph 11(c) above for the sole purpose of paying the fine imposed or to be imposed upon BCCI in the N.Y. Supreme Court pursuant to paragraph 7 of this Agreement; it being understood and agreed that the distribution set forth under this paragraph shall take precedence over all other distributions from the U.S. Fund, obtained under paragraph 11(c), unless there is written consent otherwise of both the Attorney General and the DANY;

(c) to satisfy a punitive forfeiture in an amount to be determined in the sole and absolute discretion of the Attorney General;

(d) to compensate the DOJ for the reasonable costs of investigation and prosecution of BCCI and any former employees, officers or agents of BCCI, or other individuals who assisted its criminal activities;

(e) to compensate the DANY for the reasonable costs of its investigation and prosecution of BCCI and continued investigation of the activities of former employees, officers or agents of BCCI, should DANY make an application for equitable sharing;

(f) for restitution to victims of BCCI, which may include remission to the Court Appointed Fiduciaries in accordance with 18 U.S.C. Section 1963(g) for the purpose of facilitating an increase in assets avail-

able for distribution by the Court Appointed Fiduciaries to innocent worldwide victims of BCCI, and which may include claims related to the failure of CenTrust, if any;

(g) to reimburse the Board of Governors, FDIC, RTC, OTS, OCC, SEC for the reasonable costs of their investigations of, and civil and administrative proceedings against BCCI and related persons and entities.

(h) to take other appropriate measures as authorized pursuant to 18 U.S.C. Sections 1963(f) and (g).

The DOJ will notify DANY of disbursements from the U.S. Fund.

13. Disbursements to the Worldwide Victims Fund are conditioned on availability of funds under paragraph 11, establishment of a screening mechanism under paragraph 14, and, as provided in clause (a) below, the cooperation requirements of paragraphs 17 and clauses 21(c) and (e). The amounts payable to the Worldwide Victims Fund shall be paid every 15 days beginning as soon as practicable after entry of the Forfeiture Order in increments of $50,000,000 (or such lesser amounts as are available) until all funds are paid unless:

(a) DOJ or DANY have filed written notice with the Court Appointed Fiduciaries specifying the details of a violation of or a failure to comply with paragraph 17, or in the case of an alleged violation of or failure to comply with clauses (c) and (e) of paragraph 21, upon similar written notice filed by the DOJ with the Court Appointed Fiduciaries, in which case payments will be deferred until the parties resolve any dispute over such cooperation. Any dispute not resolved by the parties within 10 days of such notification may be referred by any party to the District Court for resolution. Upon resolution

of any objection under this section, transfers will resume promptly as provided above.

(b) During the pendency of any delay by virtue of objections under clause (a) above, interest which accrues on these funds held in the Custodial Account shall accrue to the benefit of the Worldwide Victims Fund and shall be payable at the same time as and together with the principal to which it relates.

14. Prior to the transfer of funds to the Worldwide Victims Fund pursuant to paragraph 13, the Court Appointed Fiduciaries shall have established an international screening mechanism acceptable to the DOJ and DANY that assures, consistent with the laws of the countries governing the distribution of the Worldwide Victims Fund by the Court Appointed Fiduciaries, that such funds will be distributed only to innocent depositors, creditors and other victims of BCCI whose claims are not derived directly or indirectly through violations of United States or other laws concerning narcotics, terrorism, money laundering, crimes of violence, or other acts generally recognized as felonies or similar crimes under the laws of countries subscribing to recognized norms of international justice. The screening mechanism shall, where appropriate, incorporate participation of the Bank of England, the Serious Fraud Office, the Public Prosecutor of Luxembourg, and the Attorney General of the Cayman Islands and the assistance of the United States Federal Bureau of Investigation and the DANY.

15. In the unlikely event that funds in the Worldwide Victims Fund and funds otherwise available to the Court Appointed Fiduciaries exceed the amount required for full compensation of the innocent depositors, creditors and other victims of BCCI described in paragraphs 14 above, the excess funds will be returned to the United States for deposit into the U.S. Fund and distribution as contemplated in paragraph 12 above.

MISCELLANEOUS PROVISIONS

16. The parties hereto agree to assist each other in effectuating the Forfeiture Order and taking whatever action may be reasonably necessary to protect the interests of the parties hereto in the property ordered forfeited, including, without limitation, identifying and collecting BCCI assets and causing the transfer thereof to the Custodial Account, promptly addressing claims and objections to the Forfeiture Oder filed by third parties pursuant to 18 U.S.C. Sections 1963(g) and/or 1963(*l*) and, subject to the terms of this Agreement, transferring funds to the U.S. Fund and the Worldwide Victims Fund as provided herein.

17.(a) The Court Appointed Fiduciaries agree to cooperate fully with the DOJ and the DANY in their ongoing investigations and related proceedings concerning BCCI and BCCI related activities, individuals and entities, to the fullest extent allowed under applicable United States and foreign law.

(b) As used in this paragraph:

(i) "investigative information" includes documents, records, tangible evidence or other information concerning BCCI and related activities, individuals and entities requested by DOJ or DANY.

(ii) "production" of investigative information means to obtain access to, provide originals of where practicable, make and provide copies of, and permit use of such information, as specified by the requesting party.

(c) In the event that the Court Appointed Fiduciaries conclude that production of investigative information violates a relevant and applicable foreign law, the Court Appointed Fiduciaries will promptly:

(i) notify the requesting party detailing the legal prohibition or limitation to production, access, copying or other use of said information;

(ii) comply, in as complete a form as possible, with the request, in a manner that does not result in a violation of the asserted foreign law inhibition; and

(iii) take such reasonable steps, including seeking appropriate waivers from appropriate persons and entities, and making applications or joining in applications made by the requesting party, at the discretion of the requesting party, to appropriate courts or other bodies to attempt to meet the foreign legal requisites necessary to permit compliance or overcome the foreign legal barriers inhibiting compliance.

(d) Cooperation hereunder includes, but is not limited to the following, consistent with clauses (a), (c), and (e) through (g) herein:

(i) The Court Appointed Fiduciaries agree to produce to the DOJ and the DANY any investigative information that is subject to the control of the Court Appointed Fiduciaries.

(ii) The Court Appointed Fiduciaries agree to use their good offices, when requested by either the DOJ or the DANY, to facilitate production of investigative information in the custody or control of third parties.

(iii) At the request of the DOJ or the DANY, the Court Appointed Fiduciaries will direct any employee or other person subject to their control to testify in any duly convened grand jury, court, or other criminal, investigative, or administrative proceeding, and will, in addition, use their good offices and, at the expense of the

DOJ, all reasonable efforts to persuade former employees, clients, and shareholders of BCCI, and others to cooperate with the requesting party and to testify in any such proceeding.

(iv) The Court Appointed Fiduciaries agree to waive any privileges, including the attorney-client, accountant-client, and work product privileges, with respect to any investigative information existing as of July 5, 1991.

(v) The Court Appointed Fiduciaries further agree to provide investigative information created after July 5, 1991 to the DOJ and the DANY relating to the tracing and locating of assets that flowed from or to BCCI and BCCI related entities and persons as a result of criminal activity.

(e) With respect to investigative information created after July 5, 1991, it is not the intent of this Agreement to require the Court Appointed Fiduciaries to waive the attorney client privilege in connection with documents or communications reflecting or containing legal advice to the Court Appointed Fiduciaries or attorney work product related thereto or otherwise pertaining to the subject matter of their appointments.

(f) Where investigative information is requested that:

(i) was created after July 5, 1991.

(ii) was created for the purpose of negotiating settlement of specific creditor or depositor claims, and

(iii) would, in the opinion of the Court Appointed Fiduciaries, pose a substantial risk of jeopardizing the specific negotiations or materially interfere with the lawful performance

of their fiduciary obligations, the Court Appointed Fiduciaries will so inform the requesting party and provide the requesting party an estimate of how long the perceived inhibition to disclosure would persist, and will pursue, if requested by the requesting party, efforts, including resort to an appropriate judicial body, to permit the disclosure of the requested information under circumstances that will preserve confidential and secure treatment of the information and avoid the risk of interference noted above.

(g) The DOJ agrees to assume the reasonable costs of obtaining production of the foregoing for the DOJ and the DANY, upon advance notice of the approximate cost and a statement of the reasons why such production is necessary.

18. As part of the sentence imposed in connection with the entry of the pleas contemplated in paragraphs 1 and 4 above, the Court Appointed Fiduciaries agree that BCCI shall be barred from doing business within the United States except upon written notice to the DOJ and the express written permission of the appropriate Department or Agency of the United States, and with respect to doing business within the State of New York, except upon the further written notice to the DANY and the express written permission of the New York Banking, and with respect to business in the State of California, except upon the express written permission of California Banking. This provision is not intended to limit the activities of the Court Appointed Fiduciaries, pursuant to their respective court or other appointments, within the United States, in connection with the liquidation of BCCI. Additionally, before any person, other than the Court Appointed Fiduciaries, is appointed to act in a trustee or fiduciary capacity affecting assets located in the State of New York, the approval of the DANY and

the New York Banking shall be obtained, and with respect to assets in California, the approval of California Banking shall be obtained.

19. The Court Appointed Fiduciaries will obtain, with the assistance of DOJ and DANY where appropriate, all regulatory, judicial, administrative or other filings, notices, applications, consents, orders or approvals required to be obtained in order for the Court Appointed Fiduciaries, on behalf of BCCI, to satisfy fully their obligations under this Agreement, including seeking any necessary modification of the Temporary Restraining Order, the Court Appointed Fiduciaries' request for a preliminary injunction in the Section 304 Proceeding and/or the Consent Order entered in connection with the 304 Proceeding on October 16, 1991.

20. The Court Appointed Fiduciaries agree to:

(a) consent to the assessment in the amount claimed in the civil monetary penalty action brought by the Board of Governors against BCCI on July 29, 1991; and

(b) comply with the Divestiture Orders issued by the Board of Governors on March 4, 1991 and May 6, 1991 (the "Board Orders").

The Board of Governors agrees to stay and not seek execution of that assessment against any property forfeited under this Agreement or located outside the United States and to not file any claim for this assessment in the New York or California BCCI SA liquidations or in any liquidation proceeding involving BCCI in Luxembourg, the Cayman Islands or elsewhere.

21. Subject to paragraph 20, the Board of Governors, FDIC, RTC, OTS, OCC and the New York and California Banking agree to forego additional civil monetary penalty and other similar damage actions wherein they seek funds from or make claims against the Worldwide Victims Fund, the liquidation estates in the New York

and California liquidation proceedings for BCCI SA, and foreign assets and liquidation estates of BCCI, except as follows:

(a) The FDIC, RTC, OTS, OCC and New York and California Banking specifically reserve their ability, as conservators, liquidators and receivers, and potential conservators, liquidators and receivers, to file compensatory claims in the foreign liquidation process, in accordance with the appropriate foreign law. Provided, however, that if Independence Bank and First American are sold or otherwise disposed of without loss to the Bank Insurance Fund, the FDIC will not file any such claim.

(b) Further, the FDIC, RTC, OTS, OCC, New York Banking and California Banking further reserve their ability on behalf of U.S. financial institutions acting as such or in their corporate capacity, or acting as a conservator, liquidator or receiver to pursue civil contract claims.

(c) Additionally, the Board of Governors and joint issuers of the Board of Governors Orders may enforce the Board's Orders or subsequent orders issued by them in connection with the required divestiture of BCCI's interests in First American or Independence Bank.

(d) The SEC agrees to forgo any enforcement action against BCCI related to the acquisition and sale of stock and other securities in connection with the financial institutions described in the U.S. Information.

(e) The Court Appointed Fiduciaries also agree to cooperate with the Board of Governors, FDIC, RTC, OTS, OCC, and SEC in their investigations of BCCI-related wrongdoing, and in related proceedings, in the manner described in paragraph 17 above.

(f) The Court Appointed Fiduciaries release any and all claims which they may have against the Board of Governors, FDIC, RTC, OTS, OCC, SEC, New York

Banking and California Banking for actions taken in their respective regulatory capacities.

(g) Nothing in this Agreement bars New York Banking or California Banking from recovering their administrative expenses from their respective liquidation proceedings, in accordance with their respective state laws.

22. The United States and the DANY agree that, should the U.S. District Court and the N.Y. Supreme Court accept the pleas contemplated in paragraphs 1 and 4 above, and should the U.S. District Court enter the Forfeiture Order all pending criminal charges heretofore brought against BCCI by either of them shall be concluded and neither will bring any additional criminal charges against BCCI for matters occurring before July 5, 1991.

23. Pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, the parties agree that the specific sentence, including the Forfeiture Order, set forth in this Agreement provides the appropriate disposition of this case and that the parties will ask the Court to enter a Judgment of Conviction and issue a Forfeiture Order consistent with this Agreement within 10 days of the entry of the pleas in this case, considering that time is of the essence (or such other date as the U.S. District Court may set). If the U.S. District Court accepts the agreed sentence including the forfeiture as set forth above, the Court Appointed Fiduciaries, on behalf of BCCI, may not withdraw the plea contemplated in paragraph 1 above as a matter of right under Federal Rule of Criminal Procedure 11(e)(2) and (4). The Court Appointed Fiduciaries, on behalf of BCCI, understand that the Forfeiture Order of the U.S. District Court is enforceable both as a part of the sentence and in the same manner as a civil judgment. Should the judge refuse to accept the forfeiture aspect of the sentence, this Agreement shall become null and void and no party will be bound hereto.

24. The Court Appointed Fiduciaries and their attorneys acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Agreement, to induce the Court Appointed Fiduciaries to enter a plea of guilty on behalf of BCCI. The Court Appointed Fiduciaries understand that failure to abide by any term of the Agreement is a violation of the Agreement and may render it null and void or result in such sanction as may be determined by the U.S. District Court or N.Y. Supreme Court. The Court Appointed Fiduciaries further agree this Agreement shall be filed and become a part of the record in the U.S. District Court and the N.Y. Supreme Court.

25. The parties hereto understand and agree that all of the agreements contained herein shall be conditional on each such agreement and if, for any reason, the U.S. District Court, the N.Y. Supreme Court, or any other United States court of competent jurisdiction shall find any provision of this Agreement to be unenforceable, this Agreement may become null and void, at the option of either the DOJ, DANY and Court Appointed Fiduciaries, and no party hereto will be bound hereto.

26. This Agreement may be executed in one or more identical counterparts, whether transmitted by telecopier or otherwise. Each such counterpart shall be deemed to be an original for purposes of this Agreement.

27. This Agreement sets forth the entire understanding of the parties hereto with respect to the subject matter hereof. Except as explicitly set forth in this Agreement, there are no representations, warranties, or inducements —oral, written, expressed or implied—that in any way affect the validity of this Agreement or any of its terms. All prior negotiations, oral and written, are merged in this Agreement. Evidence of such negotiations, including prior drafts, shall not be admissible for any purpose in any proceeding related to this Agreement or its performance. Any amendments shall be with the mutual, written consent of the parties.

28. This Agreement shall be governed by and construed in accordance with the laws of the United States of America, except with respect to the matters contemplated in paragraph 4 through 7 hereof which, only to the extent necessary, shall be construed in accordance with applicable New York law.

29. The Court Appointed Fiduciaries agree to a tolling of any applicable statute of limitations as to criminal matters related to BCCI during the term of this Agreement and for 90 days thereafter.

WAIVER OF TRIAL RIGHTS

30. The Court Appointed Fiduciaries have read the charges against BCCI contained in the U.S. Information and the N.Y. Indictment, and those charges have been fully explained to them by their attorneys.

31. The Court Appointed Fiduciaries understand that in accordance with federal law, 18 U.S.C. Section 3013, upon entry of judgment of conviction, BCCI will be assessed $50 for each count, in addition to any other penalty imposed pursuant to this Agreement. Similarly, the Court Appointed Fiduciaries understand that in accordance with New York law, Penal Law Section 60.35, each of the pleading corporate entities upon entry of judgment of conviction, will be assessed a $100 mandatory surcharge and a $2 crime victim assistance fee, in addition to any other penalty imposed.

32. The Court Appointed Fiduciaries understand that by entering a guilty plea on behalf of BCCI, they surrender certain rights under federal and New York State law, including the following:

(a) If BCCI persisted in a plea of not guilty to the charges against it, BCCI would have the right to a public and speedy trial. The trial could be either a jury trial or a trial by the judge sitting without a jury. BCCI has a right to a jury trial. However, in

order that the trial be conducted by the judge sitting without a jury, BCCI, under New York law, and BCCI, the government and the judge, under federal law, all must agree that the trial be conducted by the judge without a jury.

(b) In the federal and New York prosecutions, if the trial is a jury trial, the jury would be composed of twelve laypersons selected at random. BCCI and its attorney would have an opportunity to seek the removal of prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising so-called peremptory challenges. The respective juries would have to agree unanimously before it could return a verdict of either guilty or not guilty, as to each count of the U.S. Information and the N.Y. Indictment. The respective juries would be instructed that BCCI is presumed innocent, and that it could not convict BCCI unless, after hearing all the evidence, it was persuaded of BCCI's guilt beyond a reasonable doubt, and that it was to consider each count of the U.S. Information and the N.Y. Indictment separately.

(c) If BCCI and the government waive the right to a jury trial, the appropriate court after hearing all the evidence, and considering each count separately, would determine whether or not it was persuaded of BCCI's guilt beyond a reasonable doubt in connection with the U.S. Information and the N.Y. Indictment.

(d) At a federal and New York state trial, whether by a jury or a judge, the prosecution would be required to present its witnesses and other evidence against BCCI. BCCI would be able to confront those prosecution witnesses and its attorney would be able to cross-examine them. In turn, although it would not be obligated to do so, BCCI could require the attendance of its witnesses within

the territorial jurisdiction of the United States through the subpoena power of the court, or in connection with the N.Y. Indictment, as provided under New York law.

(e) BCCI would have the right to have the charges outlined in the U.S. Information brought by indictment upon the concurrence of not less than 12 members of a grand jury, comprised of at least 16 and not more than 23 persons, that there is probable cause for the charges.

(f) Should the plea to the U.S. Information occur prior to entry of the guilty plea to the New York Indictment, the Court Appointed Fiduciaries waive any defense to the N.Y. Indictment based upon the New York State Double Jeopardy law in order to permit the guilty plea to the New York State Indictment to be entered as provided herein.

33. The Court Appointed Fiduciaries, on behalf of BCCI, understand that by entering a plea of guilty as provided herein, the Court Appointed Fiduciaries, on behalf of BCCI, are waiving all the rights set forth in the prior paragraph. The Court Appointed Fiduciaries' attorneys have explained those rights to the Court Appointed Fiduciaries, and the consequences of the waiver of those rights as contemplated herein. The Court Appointed Fiduciaries understand that they are waiving all appellate issues that might have been available if they had exercised its right to trial.

34. Upon imposition of the sentence contemplated herein, the DOJ will move to dismiss the remaining charges against BCCI currently pending in any U.S. District Court.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of December 19th, 1991.

Agreed by United States, and the People of the State of New York:

By:

Department of Justice

Through:

William P. Barr
Attorney General

By /s/ George J. Terwilliger
GEORGE J. TERWILLIGER
Acting Deputy Attorney General

By /s/ Robert S. Mueller III
ROBERT S. MUELLER III
Assistant Attorney General
Criminal Division

By /s/ [Illegible] Acting
SHIRLEY D. PETERSON
Assistant Attorney General
Tax Division

By /s/ Stuart M. Gerson
STUART M. GERSON
Assistant Attorney General
Civil Division

And the following
United States Attorneys:

/s/ J.B. Stephens
JAY B. STEPHENS
District of Columbia

/s/ Robert W. Genzman
ROBERT W. GENZMAN
M.D. Florida

OTTO G. OBERMAIER
S.D. New York

People of the State of
New York

By:

/s/ Robert M. Morgenthau
ROBERT M. MORGENTHAU
District Attorney
New York County

/s/ Joe D. Whitley
JOE D. WHITLEY
N.D. Georgia

/s/ Lourdes G. Baird
LOURDES G. BAIRD
C.D. California

/s/ Dexter W. Lehtinen
DEXTER W. LEHTINEN
S.D. Florida

Agreed by Court Appointed Fiduciaries

By:

But in the name and on behalf of the company by authority of the court and without personal liability

/s/ JD, CF, BAS

COMMISSAIRES OF BCCI HOLDINGS (LUXEMBOURG) S.A., not in their individual capacities

/s/ Brian Smouha
BRIAN SMOUHA

/s/ Jacques Delvaux
JACQUES DELVAUX

/s/ Constant Franssone
CONSTANT FRANSSONE

COMMISSAIRE OF BANK OF CREDIT AND COMMERCE INTERNATIONAL, S.A., not in his individual capacity

/s/ Brian Smouha
BRIAN SMOUHA

JOINT PROVISIONAL LIQUIDATORS OF BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LTD., and INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LTD., not in their individual capacities

/s/ Ian Wight
IAN WIGHT

ROBERT AXFORD

Agreed by U.S. Regulators:

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

By: /s/ William W. Wiles
WILLIAM W. WILES
Secretary

FEDERAL DEPOSIT INSURANCE CORPORATION

By: /s/ William Taylor
WILLIAM TAYLOR
Chairman

RESOLUTION TRUST CORPORATION

By: /s/ William Taylor
WILLIAM TAYLOR
Chairman

OFFICE OF THE COMPTROLLER OF THE CURRENCY

By: /s/ Robert L. Clarke
ROBERT L. CLARKE
Comptroller of the Currency

OFFICE OF THRIFT SUPERVISION

By: /s/ Timothy Ryan
TIMOTHY RYAN
Director

SECURITIES AND EXCHANGE COMMISSION

By: /s/ Richard C. Breeden
RICHARD C. BREEDEN
Chairman

Agreed by New York State Regulators:

SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, in his capacity as Liquidator of the New York Agency of Bank of Credit & Commerce International, S.A.

By: /s/ Derrick D. Cephas
Name:
Title:

By:
JAMES E. GILLERAN

SUPERINTENDENT OF BANKS OF STATE OF CALIFORNIA, As Such and As Liquidator of California Property and Business of Bank of Chedit and Commerce International, S.A.

Agreed by California State Regulators:

SUPERINTENDENT OF BANKS OF STATE OF CALIFORNIA, As Such and As Liquidator of California Property and Business of Bank of Credit and Commerce International, S.A.

/s/ James E. Gilleran
JAMES E. GILLERAN
Superintendent

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR 91-0655

Washington, D.C.
January 24, 1992
10:00 a.m.

UNITED STATES OF AMERICA

vs.

#1—BCCI HOLDINGS (LUXEMBOURG), S.A.,

#2—BANK OF CREDIT AND COMMERCE INTERNATIONAL, S.A.,

#3—BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED,

#4—INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED,

Defendants

TRANSCRIPT OF PLEA ACCEPTANCE
AND SENTENCE BEFORE THE
HONORABLE JOYCE HENS GREEN
UNITED STATES DISTRICT JUDGE

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[2]

PROCEEDINGS

THE DEPUTY CLERK: Criminal Action 91-655, United States of America versus BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International

(Overseas) Limited, and International Credit and Investment Company (Overseas) Limited. Mr. Raphaelson, Mr. Carver, Mr. Cassella, Mr. Dubester for the Government; Mr. Nussbaum, Mr. Lewis, Mr. Davis, Mr. Sheldon and Mr. Smouha for the Defendants.

THE COURT: Fifteen days ago, on January 9th of this year, pursuant to a scheduled proceeding, the four corporate defendants, BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited, collectively referred to as the BCCI defendants, appeared in open court.

Brian Smouha, in his authority as court-appointed fiduciary and as designated representative of the other court-appointed fiduciaries, also collectively court-appointed fiduciaries, tendered the Defendants' guilty pleas to the superseding information which had been filed in this Court on December 19th, 1991. That superseding information, in essence, charges the BCCI defendants with conspiracy to conduct the affairs of the enterprise through a pattern of racketeering activity, in violation of Title 18, United States Code, Sections [3] 1962(c) and 1962(d), and aiding and abetting under Section 2 of that title.

The written plea agreement between the United States of America and the four BCCI defendants was also filed that date, and in accordance with the Federal Rules of Civil Procedure, Rule 11(e)(1)(C), the parties have agreed that the specific sentence set forth in that plea agreement, including the forfeiture provisions, is the appropriate disposition of the case.

The Court makes the following findings:

By their guilty pleas in this United States District Court for the District of Columbia, the BCCI corporate defendants have expressly made waivers of venue and have proceeded to their guilty pleas by way of a superseding information, expressly waiving their constitutional rights to

indictment and trial either by jury or by the Court. They have further expressly waived other constitutional rights, in written form and orally at the January 9th hearing, including, inter alia, the right to confrontation, to cross-examination, to put the Government to its burden of proof, and to elect whether or not to put on a defense. They have further expressly waived their rights of appeal.

All of the Defendants' waivers have been made knowingly and voluntarily, with full and informed understanding of the nature, contents and consequences of the pleas. The Defendants' [4] guilty pleas have followed valued advice of their various counsel, proclaimed satisfactory to the Defendants.

The Defendants are competent to make these guilty pleas which have been tendered by the court-appointed fiduciaries through Mr. Smouha. Those court appointments are recognized and accepted by this Court.

There have been no promises, threats, coercion, or duress of any kind made to the Defendants in the process that led to the plea agreement or in the tendering of that plea agreement.

The written plea agreement constitutes the full agreement of the parties. It sets forth their entire understanding and includes the written memorandum of intent filed also on December 19, 1991. And all parties have further agreed and accepted at the January 9th hearing their understanding that, in addition to other provisions of the specific sentence agreed upon, there would be, under 18 U.S.C. 3013(a)(2)(B), a $200 assessment for each defendant in each count of this information upon entry of conviction.

There is a full and detailed factual predicate for the guilty pleas. The BCCI corporations, as they have stated through their court-appointed fiduciaries, are pleading guilty because they are in fact guilty of the serious offenses and each of the underlying acts charged in the superseding information.

The BCCI defendants have not only agreed to plea guilty [5] and have done so, but urge the Court to accept

their guilty pleas and the proposed sentence. The United States of America joins in urging the Court to accept those pleas of guilty and the proposed disposition.

The BCCI defendants and the United States of America have articulated at length in their plea agreement, at the January 9th hearing, and again through their more recent responses to nonparty filings, their precise views as to why in the public interest this Court should accept the guilty pleas and the accompanying proposed specific sentence.

Additionally, although 18 U.S.C. 1963(i) expressly prohibits nonparties from intervening in this criminal case, except as provided in Subsection (1), this Court has considered each of the submissions timely made by the persons or entities not parties to this criminal proceeding.

The Court realizes, as Mr. Nussbaum articulates so well in one of his written submissions, that, quote, there is no agreement that can be reached which would satisfy all of the diverse and irreconcilable parochial interests, end quote, that exist in this case. Nonetheless, the plea agreement now before the Court reflects on a truly global measure extraordinary efforts and amazing cooperation of a multitude of signatories representing a myriad of jurisdictions to fully settle actions against the corporate defendants, which had operated in 69 countries around the globe, and through that plea resolution, to [6] locate and protect all realizable assets of BCCI for the ultimate benefit of the depositors, creditors, United States financial institutions, and other victims of BCCI. The promise of the plea agreement is that those extraordinary efforts, that amazing cooperation, shall continue.

Upon consideration of the views of the parties and the nonparties to this case, the Court concludes that acceptance of the plea agreement is in the public interest. The agreement permanently incapacitates BCCI from ever again doing business in the United States, except, of course, as part of the liquidation proceedings currently pending.

Through the world-wide victims fund to be created pursuant to the agreement, innocent victims of BCCI's

wrongdoing can recover at least a portion of lost assets in as fair a manner as possible—equitable, orderly, and expeditious. Because the fund will be administered on a global scale through unified proceedings, piecemeal and unfair distribution can be avoided.

The plea agreement provides for the rehabilitation of United States financial institutions harmed by BCCI's criminal activity. Infusion of capital gained pursuant to the agreement will largely minimize the cost of potential damage inflicted by BCCI upon United States banks and other financial institutions and will help to ensure the viability of those institutions.

Importantly, the plea agreement resolves all criminal [7] litigation against BCCI in the United States and, consequently, avoids the high cost of protracted and expensive litigation against those corporate defendants. Moreover, the agreement secures the continuing cooperation of BCCI's court-appointed fiduciaries in the investigation and prosecution of individuals involved in related criminal activity. Such facilitation will result in the massive release of documents not otherwise readily obtainable, if at all, and, as a result, will most likely assist in bringing culpable individuals to justice while substantially increasing the amount of assets available to creditors.

Accordingly, in furtherance of the public interest and at the request of the parties, the Court accepts the four corporate BCCI defendants' pleas of guilty and the plea agreement between those defendants and the United States of America, and will embody in the judgemnt and sentence the disposition provided for in the plea agreement.

The Court finds further that there is in the record information sufficient to enable the meaningful exercise of sentencing authority without the requirement of a presentence investigation and report, and therefore will proceed directly to the sentencing.

But first, unless waived, the parties and counsel are always afforded an opportunity to speak at time of sentence. Mr. Smouha, as the court-appointed fiduciary for

the four BCCI corporate defendants, is there anything further you wish to say [8] at this time of sentence?

MR. SMOUHA: No, Your Honor. Nothing further.

THE COURT: All right.

Mr. Nussbaum, as counsel, is there anything further you wish to say, sir?

MR. NUSSBAUM: Nothing further, Your Honor.

THE COURT: Mr. Raphaelson, on behalf of the United States of America, anything further you wish to say, sir?

MR. RAPHAELSON: No, thank you, Your Honor.

THE COURT: As to the sentence. As to each of the BCCI corporate defendants, that is, BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited, the Court enters a judgment of conviction on the pleas of guilty to 18 United States Code, Sections 1962(c) and 1962(d) and 18 United States Code, Section 2.

In consideration of the forfeiture provisions, which will hereafter be reflected in a separate order, there will be no additional fine. Each of the corporate BCCI defendants is assessed for the mandatory victim assistance fund, and pursuant to 18 U.S.C. 3013(a)(2)(B), the sum of $200, to be paid within 60 days.

The order of forfeiture will be entered momentarily. And with that order of forfeiture, the provisions of 18 United [9] States Code, Section 1963, become the vehicles through which the claims of the nonparties may be addressed. As counsel have repeatedly said, and the Court agrees, there should be no interest of BCCI or the United States of America in forfeiture of property that properly belongs to others.

The parties have given their assurance that there will not be needless litigation over any (1) claim issue that may come before the Court. And if the (1) claimants reflect the same spirit of energy and cooperation that has

sparked the way and has led the parties to this day, that is, the parties, the other signatories and other courts, then that prophecy can be realized.

The worldwide collapse of BCCI six months ago has brought enormous and continuing tragedy to innocent victims. Fraud and mismanagement by BCCI's former operators ripped through the economic security of more than one million depositors and creditors. It is a fact that whatever is done here today, we cannot now, and not even eventually, completely erase that tragedy. But no one has offered the Court a better alternative than the one accepted by the Court.

We shall, each of us, do the best possible for the most. The judgment entered today, with the accompanying order of forfeiture, opens those doors.

There will be a brief pause.

The order of forfeiture has been signed. Copies of [10] that order of forfeiture, after they have been stamped by my Deputy Clerk, will be made available for those who might have some interest in them.

I wish you all good day.

(Proceedings concluded at 10:15 a.m.)

(3)

FILED
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CLERK

No. 95-360

In the Supreme Court of the United States

OCTOBER TERM, 1995

LIQUIDATION COMMISSION FOR BCCI (OVERSEAS) LIMITED, MACAU, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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26 pp

QUESTION PRESENTED

Whether the liquidator of an unincorporated branch office of a defendant banking corporation is part of "the defendant" as that term is used in 18 U.S.C. 1963(*l*)(2).

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In the Supreme Court of the United States

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LIQUIDATION COMMISSION FOR BCCI (OVERSEAS) LIMITED, MACAU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1d-10d) is reported at 48 F.3d 551. The opinion of the district court (Pet. App. 1e-19e) is reported at 833 F. Supp. 22.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1c-2c) was entered on March 3, 1995. A petition for rehearing was denied on June 2, 1995. Pet. App. 1b-2b. The petition for a writ of certiorari was filed on

August 31, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Bank of Credit and Commerce International (Overseas) (BCCI(O)) is one of four related banking entities (collectively, the BCCI Group) that pleaded guilty in the United States District Court for the District of Columbia to an information charging them with violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* Pursuant to a plea agreement, the BCCI Group agreed to the criminal forfeiture of virtually all of its assets in the United States. In January, 1992, the district court accepted the guilty plea and entered an order of forfeiture under 18 U.S.C. 1963(a). Pet. App. 4d. Petitioner is the liquidating commission appointed by regulators in Macau to liquidate and dispose of assets owned by BCCI(O)'s unincorporated branch there. Petitioner challenged the forfeiture under 18 U.S.C. 1963(*l*)(2), alleging a legal interest in certain assets separate and superior to that of BCCI(O). The district court dismissed petitioner's claim for lack of standing (Pet. App. 13e-14e), and the court of appeals affirmed (*id.* at 1d-10d).

1. Prior to its collapse in 1991, the BCCI Group was a global banking organization operating in 69 countries. In July, 1991, bank regulators in the principal jurisdictions in which the BCCI Group did business acted jointly to shut down the Group's worldwide operations. Courts in the Cayman Islands and Luxembourg, where the BCCI Group's main banking entities were incorporated, appointed fiduciaries (the Court Appointed Fiduciaries (Ct. App. Fid.)) to consolidate the BCCI Group's assets for

global distribution to its international creditors and depositors.[1] Pet. 5-6; Ct. App. Fid. Br. in Opp. App. 12a-13a.

BCCI(O), one of the four major entities comprising the BCCI Group, was incorporated in the Cayman Islands and engaged in banking in 28 countries through a network of unincorporated branches, including a branch in Macau. Pet. 5; Ct. App. Fid. Br. in Opp. 3. Despite the internationally coordinated efforts of the Court Appointed Fiduciaries to consolidate the BCCI Group's global assets, local banking regulators in several foreign jurisdictions seized BCCI(O) branch operations and appointed liquidators to administer their assets under local law. Ct. App. Fid. Br. in Opp. 3. The Macau government appointed petitioner as liquidator for the BCCI(O) branch there. Pet. 5-6. That appointment was based in part on Macau's interest in providing local depositors and creditors "with conditions which * * * will allow them to benefit quickly *and preferentially* from the assets which could be realized." (English translation of order appointing petitioner) (emphasis added). App., *infra*, 6a.

2. Meanwhile, criminal investigations into the BCCI Group's activities continued in the United States and elsewhere. In December 1991, the BCCI Group, through the Court Appointed Fiduciaries, entered into the plea agreement mentioned above, in which the BCCI Group pleaded guilty to RICO charges and agreed to the criminal forfeiture of its United States assets. Ct. App. Fid. Br. in Opp. App.

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[1] The Court Appointed Fiduciaries of the BCCI Group are additional respondents in this proceeding. See Ct. App. Fid. Br. in Opp. (i).

11a-39a. The district court's forfeiture order—the subject of this proceeding—provided for the seized assets to be divided equally between two funds: a global liquidation fund to compensate innocent victims of BCCI Group's wrongdoing worldwide; and a United States fund to be used, at the Attorney General's discretion, to offset losses to the FDIC and the American taxpayer. *Id.* at 20a-23a; Pet. App. 4e. The total amount forfeited, in excess of $500 million, consisted in significant part of bank accounts maintained in the United States in the name of BCCI Group's foreign branches. See *United States* v. *BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185, 1187 (D.C. Cir.), cert. denied, 115 S. Ct. 2613 (1995).

3. Section 1963(*l*)(2) of Title 18 allows third parties, defined as "[a]ny person, other than the defendant," to petition for relief by "asserting a legal interest in property which has been ordered forfeited to the United States pursuant to" RICO. The claimant may request a non-jury "hearing to adjudicate the validity of his alleged interest in the property." 18 U.S.C. 1963(*l*)(2). The court must amend the forfeiture order if the claimant establishes that, at the time of the commission of the acts giving rise to forfeiture, the claimant's "legal right, title, or interest in the property * * * was vested in the [claimant] rather than the defendant or was superior to any right, title, or interest of the defendant." 18 U.S.C. 1963(*l*)(6)(A). The forfeiture order must also be amended if the claimant was a "bona fide purchaser for value" of the forfeited property. 18 U.S.C. 1963(*l*)(6)(B).

Petitioner is one of ten representatives of unincorporated branches of BCCI(O) in various foreign jurisdictions that sought relief from the district

court under Section 1963(*l*)(2).[2] Pet. App. 1e-2e & n.4. Although petitioner did not dispute that the Macau branch was not separately incorporated, and conceded that "the branch of BCCI in Macao is part of the entity BCCI (Overseas), Ltd.," App., *infra*, 2a, petitioner still claimed to be a "separate juridical entit[y]" under both federal and local law. Pet. App. 5e. Petitioner argued that the Macau branch was "not bound by the plea agreement[]" entered into by BCCI(O), and that the funds held in the branch's name had "nothing to do with criminal activities of" the BCCI Group. App., *infra*, 2a. The United States moved to dismiss the petitions of the branch representatives on several grounds, including lack of standing. Pet. App. 5e-7e.

4. The district court granted the government's motion, holding that the bank branches were not third parties with standing to bring a Section 1963(*l*)(2) claim. The court based its decision on a long line of federal cases treating unincorporated bank branches as the same legal entities as their parents. The court concluded that "branches of BCCI Overseas are part of [the] 'defendant' [in this case] as a matter of law and that the branches therefore do not have standing under [section] 1963(*l*)(2)." Pet. App. 12e-13e.

5. The court of appeals affirmed. Pet. App. 5d-7d. The court held that federal common law, not the potentially conflicting laws of the numerous foreign jurisdictions where BCCI(O) did business, should

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[2] Petitioner is the only one of these branch representatives that is seeking review by this Court. Petitioner seeks release of funds in excess of $1.6 million contained in New York bank accounts under the name, "BCCI (Overseas) Limited, Macau." Pet. 6.

define whether petitioner and others similarly situated were part of "the defendant," as that term is used in 18 U.S.C. 1963(*l*)(2). Pet. App. 8d-9d. The court then recognized the general principle that, "while individual bank branches may be treated as independent of one another, each branch, unless separately incorporated, must be viewed as a part of the parent bank rather than as an independent entity." *Id.* at 5d. In light of this principle, the court concluded that petitioner, as successor to a constituent part of defendant BCCI(O), lacked independent standing to file a petition for relief from a forfeiture order entered against the entire entity.

ARGUMENT

1. The decision of the court of appeals that petitioner lacked standing under 18 U.S.C. 1963(*l*)(2) is correct and does not conflict with the decision of any other court.

a. The court of appeals correctly concluded that 18 U.S.C. 1963(*l*)(2) bars a bank's unincorporated branch—or the branch's successor liquidator—from independently challenging a RICO forfeiture entered against the bank as a whole. Because Section 1963(*l*)(2) provides that "[a]ny person, other than the defendant," may petition for relief from forfeiture, the plain language of that Section does not allow claims by any constituent part of a defendant. Under the common law of corporations, as applied to banks, a bank branch is, unless separately incorporated, a constituent part of the bank. See generally 1 R. Natter, *Banking Law* § 5.02 (1995) (hereinafter *Banking Law*) ("Branch banks are * * * not separate legal entities."). Just as an unincorporated division of a corporation lacks a juridical personality

separate from the corporation itself, an unincorporated branch of a bank lacks a juridical personality separate from that of the bank as a whole. As the court noted in *Vishipco Line* v. *Chase Manhattan Bank, N.A.*, 660 F.2d 854, 863 (2d Cir. 1981), cert. denied, 459 U.S. 976 (1982):

> [W]hen considered with relation to the parent bank [foreign branches] are not independent agencies; they are, what their name imports, merely branches, and are subject to the supervision and control of the parent bank, and are instrumentalities whereby the parent bank carries on its business.

(quoting *Sokoloff* v. *National City Bank*, 224 N.Y.S. 102, 114 (Sup. Ct. 1927), aff'd mem., 227 N.Y.S. 907 (App. Div.), aff'd, 164 N.E. 745 (1928)).

The decision below is also supported by the well-settled principle that "[a]n incorporated bank must sue and be sued in its corporate name. * * * The corporate name of the principal or parent bank should be used in suits by or against branch banks." 6B *Michie on Banks and Banking*, ch. 14, § 7 (repl. vol. 1992). A branch of BCCI(O) challenging the forfeiture of assets held in the branch's name must therefore file a petition in the name of BCCI(O) itself. Here, BCCI(O) is a named defendant in the RICO law suit. If petitioner had brought its claim in the name of BCCI(O), as required, it could not be considered a party "other than the defendant." 18 U.S.C. 1963(*l*)(2).[3]

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[3] The district court drew a useful analogy "to cases which hold that unincorporated divisions of a parent corporation cannot be indicted or sued." Pet. App. 13e-14e. See, *e.g.*, *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 18 (3d Cir. 1978)

The holding below makes perfect sense in the RICO forfeiture context. The purpose of Section 1963(*l*)(2) is to prevent a court from ordering forfeiture of property over which it has no jurisdiction because the property does not actually belong to the defendant. See *United States* v. *Schwimmer*, 968 F.2d 1570, 1580 (2d Cir. 1992). While a bank's assets may be held in the name or under the immediate control of its local branches, those assets still belong to the bank as a whole. See *Sokoloff*, 224 N.Y.S. at 114 (the branches' "property and assets belong to the parent bank, although nominally held in the names of the particular branches"); 1 *Banking Law* § 5.02 ("All the assets of a branch bank are owned by the parent bank."). The rule proposed by petitioner would give each bank branch standing to challenge the forfeiture of the bank's assets after the legitimate representatives of the bank as a whole have agreed to the forfeiture as part of a valid plea bargain. Such a rule would entangle the courts in numerous fruitless claims and unnecessarily impede the ability of the federal government to enforce RICO's forfeiture provisions against banking corporations.[4]

("A division of a corporation is not a separate entity but is the corporation itself."). The district court concluded that since "unincorporated divisions and their parents cannot be considered separate entities for the purpose of indictment, it would be anomalous to consider them separate entities" for the purpose of determining standing to file a petition under Section 1936(*l*)(2). Pet. App. 14e.

[4] Petitioner argues in the alternative that, as liquidator of BCCI(O)'s Macau branch, petitioner should not be equated with the branch itself. Pet. 13 (petitioner is "in fact, two steps removed from the BCCI [c]riminal [d]efendants"). Petitioner bases this argument on the fact that it was appointed by the Macau government with a special "duty to depositors and

b. Petitioner contends that the decision below is "in direct conflict with a line of federal decisions holding that a branch bank is * * * a separate business entity." Pet. 15. These authorities, however, do not apply to the instant case. As the court of appeals observed, the cases cited by petitioner, Pet. 15-16, "treat branches like independent banks in discrete, narrow contexts unrelated to the branches' juridical status." Pet. App. 6d-7d n.6. These cases relate to such matters as the ability at common law of a depositor at one branch to collect at another branch,

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creditors to marshall and distribute" the assets of BCCI(O)'s Macau branch. *Ibid.* But petitioner's responsibilities are essentially no different from those of the receiver of an insolvent bank. See 3 *Michie on Banks and Banking*, ch. 6, § 102 (perm. ed. 1974) ("It is the duty of the receiver of an insolvent bank to collect and conserve its assets for the equal and pro rata benefit of creditors."). A receiver's customary duty to collect assets to pay various creditors does not change its legal status as successor to the failed bank. Cf. *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048, 2054 (1994) (FDIC as receiver of failed savings and loan "steps into the shoes" of the institution, obtaining its rights as they existed prior to receivership). Thus, the court of appeals correctly held that petitioner "stands in the shoes" of BCCI(O)'s Macau branch, and has "no more standing to file petitions than do[es] the branch[] [it] represent[s]." Pet. App. 7d-8d.

Petitioner emphasizes its duties to the branch's depositors. However, "a bank account * * * consists of nothing more or less than a promise to pay, from the bank to the depositor." *Citizens Bank of Md.* v. *Strumpf*, No. 94-1340 (Oct. 31, 1995), slip op. 5. As general unsecured creditors, a bank's depositors do not have a "legal interest" in the defendant bank's forfeited property, and so lack standing to challenge the RICO forfeiture under Section 1963(*l*)(2). See *United States* v. *BCCI Holdings (Luxembourg), S.A.*, 833 F. Supp. 9, 15 (D.D.C. 1993), aff'd, 46 F.3d 1185 (D.C. Cir.), cert. denied, 115 S. Ct. 2613 (1995).

or the requirement that a foreign branch keep its books and records separate from those of its home office. None of the cases cited by petitioner addresses the issue of whether a branch bank may sue to obtain relief from actions taken by the legitimately constituted representatives of the bank as a whole.[5]

c. Petitioner also disputes the judgment below on the ground that foreign law should be examined in construing the phrase, "other than the defendant" in Section 1963(*l*)(2). The court of appeals, however, correctly held that federal law, not the laws of the 28 foreign jurisdictions where BCCI(O) had branches, determines whether BCCI(O) branches were part of defendant BCCI(O) for purposes of interpreting a federal criminal statute. Pet. App. 8d-9d. Unless Congress expresses a contrary intention, federal criminal statutes should not be construed in a fashion that would impede their uniform application. See *Taylor* v. *United States*, 495 U.S. 575, 590-592 (1990) (declining to adopt state definitions of "burglary" in applying federal sentence enhancement statute); *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 111-112 (1983) (definition of the term "convicted" in federal criminal statute should be based on federal law for the sake of "national uniformity unaffected by varying state laws, procedures, and definitions"); *United States* v. *Turley*, 352 U.S. 407, 411 (1957) ("[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law."). Moreover, Congress made

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[5] The decisions below in this case are the only reported decisions that address the question of an unincorporated branch's standing under 18 U.S.C. 1963(*l*)(2).

clear that it intended RICO's forfeiture provisions to be applied uniformly, without regard to local law, by requiring forfeitures to occur "irrespective of any provision of state law." 18 U.S.C. 1963(a).[6]

In any event, it is unlikely that applying the law of BCCI(O)'s place of incorporation (the Cayman Islands), or of Macau, as petitioner suggests (Pet. 18), would change the outcome of this case. Under the law of the Cayman Islands, "branch banks * * * [i]n principle and in fact * * * are agencies of one principal banking corporation." *Prince* v. *Oriental Bank Corp.*, 3 App. Cas. 325, 332-333 (P.C. 1878). Similarly, the United States demonstrated in district court through an affidavit from qualified foreign counsel that, under the law of Macau, a branch is part of the same bank entity as its head office when the two are considered in relationship to each other.

2. Petitioner complains that the dismissal of its Section 1963(*l*)(2) claim violated due process because the district court did not conduct the evidentiary hearing for which Section 1963(*l*)(5) provides. Pet. 10-12, 13, 17. Congress clearly contemplated, however, that "[t]he [district] court may decline to grant a[n evidentiary] hearing * * * if the petition fails to state any basis for relief described in this provision." S. Rep. No. 255, 98th Cong., 1st Sess. 208 n.46 (1983). Thus, the courts have held that if a claimant "fails to allege in its petition all elements necessary for recovery, including those relating to standing, the

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[6] Petitioner relies for support on a single unreported district court case (Pet. 18), *Futurology Impex Corp.* v. *International Trade Group, Inc.*, No. CV 85-2357, 1987 WL 42986 (E.D.N.Y. Dec. 18, 1987). *Futurology* addressed a choice of law issue in the context of a contract claim brought under federal diversity jurisdiction, and is thus inapposite.

court may dismiss the petition without providing a hearing." *BCCI Holdings (Luxembourg), S.A.*, 833 F. Supp. at 13, citing *United States* v. *Campos*, 859 F.2d 1233, 1240 (6th Cir. 1988).

In any case, an evidentiary hearing is not necessary on a motion to dismiss if the relevant facts are not disputed. *Codd* v. *Velger*, 429 U.S. 624, 627 (1977) (per curiam). In ruling on the United States' motion to dismiss, the courts below assumed the truth of the factual allegations in petitioner's claim. Petitioner concedes that it represents an unincorporated branch of BCCI(O), and this fact alone provided a sufficient basis for dismissing the claim as a matter of law. Nor was an evidentiary hearing required to consider any questions of foreign law that petitioner raised. See Pet. 8-9. The determination of foreign law is a "ruling on a question of law" under the Federal Rules of Criminal Procedure. See Fed. R. Crim. P. 26.1.

3. Petitioner argues that the decision below violates principles of international comity by failing to recognize the actions of Macau to protect creditors of BCCI(O)'s branch there. Pet. 18-19. Petitioner, however, failed to raise the issue of comity in the district court. It cannot raise it now. See *Tennessee* v. *Dunlap*, 426 U.S. 312, 316 n.3 (1976).

Nor does the court of appeals' decision threaten international comity. The decision does not question the validity of petitioner's appointment by authorities in Macau or prevent petitioner from discharging its responsibilities by paying branch creditors in Macau from assets that petitioner may be able to control. Comity also would not require or permit the plain language of Section 1963(*l*)(2) to be ignored. "The comity * * * extended to other nations * * * is the voluntary act of the nation by which it is offered; and

is inadmissible, when contrary to its policy, or prejudicial to its interests." *Bank of Augusta* v. *Earle*, 38 U.S. (13 Pet.) 519, 589 (1839).

Finally, the decision below does not mean that the legitimate interests and expectations of the Macau branch's creditors will be unprotected. The assets collected by the Court Appointed Fiduciaries will be distributed ratably to all creditors who participate in the global liquidation. Creditors of BCCI(O)'s branch in Macau can participate in the global liquidation so long as petitioner agrees to pool funds in its possession with the worldwide victims fund. Indeed, the very purpose of creating a worldwide victims fund, "administered on a global scale through unified proceedings," is to avoid the "piecemeal and unfair distribution" of the defendant bank's assets and ensure that all "innocent victims of BCCI's wrongdoing can recover at least a portion of lost assets in as fair a manner as possible—equitable, orderly, and expeditious." *BCCI Holdings (Luxembourg)*, 833 F. Supp. at 14, quoting Transcript of Plea Acceptance and Sentence (January 24, 1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
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Attorneys

NOVEMBER 1995

APPENDIX

BANK OF CREDIT AND COMMERCE INTERNATIONAL
(OVERSEAS) LIMITED **IN LIQUIDATION**
45 RUA DA PRAIA GRANDE MACAU

TO

THE HONORABLE JUDGE OF
DISTRICT OF COLUMBIA
3RD AND CONSTITUTION AVE., N.W.
WASHINGTON, D.C. 20001
U.S.A.

RE: NOTICE OF THIRD PARTY CLAIMANT PROCEDURE FOR PROPERTY FORFEITED IN UNITED STATES V. BCCI HOLDINGS (LUXEMBOURG), S.A. ET AL., CRIMINAL NO. 91-0655 (BHG)—UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Dear Sir,

Dr. Antonio dos Santos Ramos and Mr. Antonio Maria Ho, as the Liquidation Commission for the Bank of Credit and Commerce International (Overseas) Ltd., Macau Branch, "The Commission", as for their answer to the above mentioned Notice, allege as follows:

1. The Commission was established in April 8, 1992, by the Governor of the Territory of Macao (Executive Order no 82/92/M, of April 6, annexed hereto as Exhibit A and incorporated herein by reference).

2. Local Banking Law (Decree-Law no 35/82/M, of August 23) provides in Articles 1 through 18 and 108 through 115, *inter alia*, that assets booked in a local branch of a foreign bank may not be used to meet obligations incurred abroad nor may foreign judgments of bankruptcy or liquidation be enforced in Macao. (Decree-Law 35/82/M, annexed hereto as Exhibit B).

3. The Bank of Credit and Commerce International (Overseas) Ltd., and its owners, agreed to comply with all relevant regulation and laws of Macao and Portugal upon being authorized to open the branch. The Macao branch is subject to regulatory decrees and the regulation governing the system of credit and financial structure of Macao. (Initial petition and BCCI to have granted the licence, annexed hereto as Exhibit C).

4. Although the branch of BCCI in Macao is part of the entity BCCI (Overseas), Ltd., headquatered abroad, it is bound by local laws in all matters related to its activities in Macao, including those related with the winding-up procedures and inherent liabilities.

5. The activity of this branch was very closely supervised by local authorities since a few years ago, so that all the money placed with USA institutions is believed to be clean and originated by normal business, having nothing to do with criminal activities of BCCI Groups in USA. (Annexed hereto documentation related to the forfeited

amounts: Exhibit D, placement of US$ 1,300,000.00 with American Express Bank; Exhibit E: amount of US$ 247,751.59 placed also with American Express Bank; and Exhibit F: US$ 109,122.75, money placed with Bank of America.).

6. As liquidators of the branch we understand that, according to the local law, money booked in Macao must be shared among the innocent creditors of the same branch to whom the forfeited funds belong.

7. And that this branch is not bound by the plea agreements of the headoffice, because, since the beginning of its activities in Macao, BCCI (Overseas), Ltd., and its owners accepted to comply with the regulations of the jurisdiction of this Territory.

8. This understanding inhibits us to undersign any documents transferring to the Government of the USA the said money.

9. So this Commission requests the best understanding of your goodself to its duty to protect the local innocent people that, *bona fide*, dealt with USA credit institutions.

10. Wherefore, the Commission respectfully requests that this Court grants it the following relief:

    a) Award the Commission with a direction that the said funds be immediately transferred as directed by the Commission and

    b) Grant to the Commission the cost and disbursements of this action.

Dated: Macao, April 9, 1992.

Very truly of yours,

THE LIQUIDATION COMMISSION

/s/ António dos Santos Ramos
Dr. António dos Santos Ramos

/s/ António Maria Ho
Mr. António Maria Ho

Excerpts from Exhibit A

(Free Translation)

Executive Order no. 82/92/M of April 6, 1992

The Bank of Credit & Commerce International (Overseas) Ltd., herein called BCCI (Overseas), with head office in George Town, Grand Cayman, was authorized by Executive Order no. 19/83/M, of January 29, 1983, to open a branch in Macau to carry out the banking and credit activities within the legal framework applicable to commercial banks, and having carried out those authorized activities, normally, from July 8, 1983 up to July 5, 1991.

Following the awareness of the decision from the Bank of England, announced on July 5, 1991, to close the branches of companies connected with BCCI Group, which were operating in United Kingdom, the Macau branch was put under the control of Macau Government, with the appointment of delegates by Dispatch no. 10/SAEF/91, of July 8, 1991.

Due to the seriousness of the international state of BCCI Group and on July 12, 1991, the delegates were replaced by an administrative commission, whose tenure was repeatedly renewed under the applicable legal provisions, and the activities of that Bank in Macau were temporary suspended (Dispatch no. 11/SAEF/91, of July 12, 1991).

In the meantime, due to the incapability of the major shareholders to put forward an re-structuring plan, the BCCI (Overseas), of which the Macau branch is directly dependent, was declared insolvent and put

into liquidation on January 14, 1992, by court sentence of George Town, Grand Cayman. Identical measures were taken in the majority of jurisdictions where the Group was operating.

On the other hand, following the criminal proceeding, the U.S.A. authorities forfeited all assets within United States of America belonging to the referred Group, among those were some assets belonging to the Macau branch. The situation is propitious to a never ending crossed claims between various jurisdictions and to disputes on assets outside of their respective territories.

Taking into consideration that:

The liquidators of the Group main companies, aiming for a global solution, are trying to solve the conflict between the various jurisdictions through the set-up of a common poll which by negotiable participation could benefit different creditors;

At a local level and up to now, was impossible to find a parallel solution capable to reduce in a satisfactory way the damaging effects created by this situation, being certain that, due to legal constrains, the intervention of the administrative commission could not be extended after April 7, 1992;

Since it concerns an institution specially licensed and subject to supervision by the Macau Government, it is of evident public interest to provide the depositors and other creditors of the local branch of BCCI with conditions which, within a framework of joint interests, will allow them to benefit quickly and preferentially from the assets which could be realized, under the provisions of articles 113 and 114 of Decree-Law no 35/82/M, of August 3, 1982, and

avoiding at the same time that those assets be spend in costs and fees for judicial attorneys;

It is also of great convenience that this framework of conditions be flexible up to the point to allow the search for a solution which reduce the losses, mainly, in proceedings with local institutions, the Group main liquidators and respective shareholders, and to be useful for the involvement of depositors and other creditors in the process to be carried out.

Therefore;

Since the conditions on which were based the authorization granted to Bank of Credit and Commerce International (Overseas) Ltd. to carry out the banking activity in Macau have ceased to exist;

Taking into account the uniqueness of the situation and the public interest in the stability and protection of the local banking market's good name;

Under the proposal of the Monetary and Foreign Exchange Authority of Macau;

With the power which was delegated to me under Article 16, no. 1, paragraph f), of the Macau Organic Constitution, and under the provisions of article 9 of Decree-Law no. 59/83/M, of December 30, 1983, and article 13, no. 1, paragraph g), of Decree Law no. 35/82/M, of August 3, 1982, the Governor orders:

Article 1

The authorization granted to Bank of Credit and Commerce International (Overseas) Limited, by Executive Order no. 19/83/M, of January 29, 1983, to carry out the banking and credit activities is revoked.

Article 2

The administrative commission appointed to the Macau branch of Bank of Credit and Commerce International (Overseas) Limited, by Dispatch no. 11/SAEF/91, of July 12, 1991, with tenure renewed by Dispatches no.s 15/SAEF/91 and 21/SAEF/91, of September 26 and December 27, both of 1991, ceases its duties.

Article 3

I appoint to the liquidation commission for the referred branch, dr. Antonio dos Santos Ramos, who will chair it, and Antonio Maria Ho, both technical staff from the Monetary and Foreign Exchange Authority of Macau, which could also be joined by a member to be nominated by the creditors and appointed by dispatch.

Article 4

The liquidation commission shall carry out the extra-judicial liquidation of that branch, under the provisions of article 9, no. 2, of Decree-Law n. 59/83/M, of December 30, 1983, and other applicable legislation, and should in its capacity search for the merge of and to defend the various parties' interests in this process and to find all possible parallel solutions which could reduce the losses.

Article 5

I consider applicable to the liquidation commission's members the provisions of article 13, no. 2, of Decree-Law no. 59/83/M, of December 30, 1983.

Article 6

I set June 20, 1992 as the cut-off date for claims of credits on the Macau branch and their verification.

Article 7

In the event of an extra-judicial liquidation being impossible, namely due to creditors' opposition, the liquidation commission shall petition the Delegate of the Public Attorney to start the liquidation by the court.

Article 8

This Executive Order comes into effect on April 8, 1992.

Macau Government, March 27, 1992.

Publish it.

The Governor,
Vasco Rocha Vieira

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(The official Portuguese text prevails)